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. S190647

Second Appellate District, Division Four, Case No. B217709
Los Angeles County Superior Court, Case No. MA043902
The Honorable Hayden Zacky, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Is appellant's aggregate prison sentence of "110 years to life" for three premeditated attempted murder convictions and gang, firearm, and great bodily injury enhancements categorically barred as cruel and unusual punishment because he was 16 years old when he committed his crimes?

INTRODUCTION

Appellant, admittedly "trying to kill somebody," shot several times at three rival gang members on their way home from school because appellant wanted to "save[] his hood." One bullet struck one boy in the back; the other bullets missed the other boys. Appellant was later convicted of three counts of premeditated attempted murder, enhanced by findings that he intended to promote gang activity, discharged a firearm, and caused great bodily injury. For his three offenses, appellant was consecutively sentenced to one prison term of 40 years to life, and two prison terms of 35 years to life. The Court of Appeal affirmed his conviction on appeal, rejecting a claim that under *Graham v. Florida* (2010) 130 S.Ct. 2011 [176 L.Ed.2d 825], his total sentence violated his federal constitutional right against cruel and unusual punishment because it amounted to life without parole for a juvenile nonhomicide offender.

STATEMENT OF THE CASE

On June 6, 2007, at about 1:30 p.m., a group of boys consisting of Adrian Bautista, 14-year-old Jesse Banuelos, 14-year-old Mark Johnson (on a bicycle), Carlos Vargas, and Vincent Valle, were walking home from school on 37th Street East near Sunstream Avenue in Palmdale. Banuelos and Johnson separated to go to Johnson's house, while Bautista, Vargas, and Valle walked ahead. (2RT 905-910, 922-925, 932, 941-942, 944-945, 959-969, 979-982; 3RT 1204-1205, 1209; 1CT 68.) Vargas and Valle were

members of the Val Verde Park gang; Bautista became a member less than three months later.. (2RT 920, 944-945, 960, 974, 1000-1001; 3RT 1210, 1217.) The Val Verde Park gang was a rival of the Lancas gang. (2RT 944, 989; 3RT 1210.)

Appellant, a 16-year-old Lancas gang member known as "Dreamer," approached the group from a car parked on Sunstream. (2RT 911, 933, 945, 947, 980, 982, 993, 995, 1000, 1010, 1029; 3RT 1207-1208.) Appellant asked the group, "Where are you from?" and then yelled, "Vario Lancas" or "Lancas." (2RT 911-912, 929-930, 947-948, 952, 962, 980-982, 1013.) Vargas yelled back, "Fuck you," and "Val Verde Park," claiming his gang. (2RT 947, 952, 982, 1013.) From about 17 to 20 feet away, appellant fired three to five shots from a black handgun at the group, striking Bautista in the back and upper shoulder, causing him to fall to the ground. (2RT 911-912, 914, 916, 925, 931, 943, 947-950, 961, 963, 971-973, 981-983, 1012-1015, 1019-1020; 3RT 1206-1211, 1213, 1219.) The other boys ran away. (2RT 911-912, 916, 928, 950.) Appellant left. (2RT 917.)

Bautista lay face down on the front lawn of a nearby house, bleeding from his upper back, nose, and mouth, and having trouble breathing. (2RT 330-331, 916, 925, 928, 963-965, 973.) Bautista was taken to the hospital, where he stayed for over a day. (2RT 331-332, 916-917, 963-966.) The police found five expended shell casings on the sidewalk and one bullet embedded in the wall at the front of the house. (2RT 335-339.) Expert gang testimony established that appellant's shooting at rival gang members would benefit the Lancas gang by helping it gain notoriety and respect and

by causing fear and intimidation, enabling the gang to commit other crimes. (2RT 1001-1002, 1006-1008, 1011-1012.)[1]

Appellant testified that he was "straight trying to kill somebody" on this day. (3RT 1227.)[2] Appellant explained that he had committed the shooting because the victims were his "enemies" as they were "from a different neighborhood," and because they had answered, "VVP," a rival gang. (3RT 1227, 1229-1230.) Appellant believed that in doing so, he had "saved [his] hood. Lancas." (3RT 1230.)

After a jury trial, appellant was convicted of three counts of premeditated attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a)), with personal and intentional discharge of a firearm, a handgun, that, as to count 1, caused great bodily injury or death (Pen. Code, § 12022.53, subds. (b), (c), (d)).[3] The jury also found that appellant committed the offenses for the benefit of, at the direction of, or in association with, a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members (Pen. Code, § 186.22, subd. (b)(4)). (CT 21-24, 36, 43-45, 86-88.) On each of the three counts, the trial court sentenced appellant to state prison for a term of life with a minimum of 15 years for the premeditated attempted murder and gang finding. On count 1, the trial court also imposed a term of 25 years to life for the great-bodily-injury firearm enhancement, and on counts 2 and 3, imposed terms of 20

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[1] While Valle was testifying, appellant mouthed, "You're dead," in his direction. (3RT 1235.)

[2] Appellant also testified, "I wasn't trying to kill him, but I did a shooting" (3RT 1227), and, "My intent wasn't to kill them. I was just shooting at them" (3RT 1230).

[3] Appellant had been found unfit for juvenile court and was tried in adult court. (Opn. at p. 4.)

years for the personal-and-intentional-discharge firearm enhancements.[4] The trial court imposed consecutive sentences on the three counts. (CT 88-92.)[5] Appellant did not object to his sentences, individually or cumulatively. (3RT 1285-1289.)

On appeal, appellant filed his opening brief raising claims of ineffective assistance of counsel, competence to stand trial, and the omission of a lesser included instruction. The United States Supreme Court then issued *Graham v. Florida* (2010) 130 S.Ct. 2011 [176 L.Ed.2d 825], holding that a juvenile's sentence of life in prison without the possibility of parole for a nonhomicide offense is cruel and unusual punishment under the Eighth and Fourteenth Amendments. After oral argument, appellant contended in supplemental briefing that under *Graham*, appellant's total prison sentence of 110 years to life for the premeditated attempted murders and enhancements was categorically barred because it was effectively the same as a sentence of life in prison without the possibility of parole ("life without parole" or "LWOP").

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[4] The abstract of judgment incorrectly reflects the firearm enhancement on count 3 as being imposed under subdivision (b) of Penal Code section 12022.53, instead of subdivision (c). (1CT 91; see 3RT 1287.) Respondent respectfully asks this Court to order that the abstract of judgment be corrected to accurately reflect the sentence that the trial court orally imposed. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185, 188.)

[5] The parties, the trial court, and the Court of Appeal have characterized the total sentence as 110 years to life, and the sentences on counts 1, 2, and 3, as 40 years to life, 35 years to life, and 35 years to life, respectively. Technically, as set forth above, this terminology incorrectly lumps together the determinate enhancements, the indeterminate life sentences, and the extended parole eligibility findings. Respondent will nonetheless use the same shorthand references for ease and consistency.

The Court of Appeal rejected appellant's claims and affirmed his conviction.[6] As to appellant's *Graham* claim, the Court of Appeal "disagree[d] that *Graham* applies to individuals in [appellant's] position." (Opn. at p. 17.) In the Court of Appeal's view, *Graham* limited its holding to sentences of life without the possibility of parole, not specific term-of-years sentences:

> 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.] . . . .)

(Opn. at p. 18.)

The Court of Appeal, moreover, reasoned that *Graham* did not prohibit appellant's total sentence because it was based on separate sentences for three attempted murders that appellant committed, none of which by itself amounted to "de facto life without the possibility of parole . . . ." (Opn. at pp. 18-20.) The court explained that under a contrary view,

> 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

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[6] In the opinion, the Court of Appeal also denied appellant's concurrent petition for writ of habeas corpus raising competency and ineffective-counsel claims. (Opn. at p. 21, fn. 8.)

> had the good fortune to survive their wounds, because the sentence would exceed the perpetrator's life expectancy. . . . [Appellant'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.

(Opn. at p. 20.) The Court of Appeal lastly noted that appellant did not claim that his sentence was unconstitutional other than based on *Graham*'s categorical prohibition against a juvenile being sentenced to life without parole for a nonhomicide crime. (*Ibid.*)

SUMMARY OF ARGUMENT

For three reasons, appellant's sentence is not cruel and unusual punishment under the rule in *Graham* prohibiting a life without parole sentence for a juvenile's nonhomicide offense. First, the high court does not consider attempted murder to be a nonhomicide offense in this context, a point proved by three passages in *Graham* and supported by the historical basis of its rule. Second, the clear line drawn in *Graham* forbids only a sentence of life without parole, and does not encompass a specific term of years exceeding a juvenile's life expectancy—an assessment that would lead to unreliability, unfairness, and litigation. Third, as numerous courts have determined, a cumulative sentence for distinct crimes does not present a cognizable Eighth Amendment claim; instead, the constitutionality of each sentence must be evaluated individually, and here, each of appellant's sentences was permissible because it included the possibility of parole within his lifetime.

More generally, the Supreme Court's framework for "categorical" challenges of cruel and unusual punishment demonstrates that appellant's 110-to-life aggregate sentence for his crimes is not intrinsically unconstitutional. As with the specific rule of *Graham*, this Court should

find that cumulative sentencing falls outside the scope of the Eighth Amendment. Moreover, appellant has not satisfied his heavy burden of showing that a national consensus exists against imposing an aggregate prison term with a parole eligibility date exceeding a juvenile's life for three aggravated attempted murders. A consideration of the culpability of this class of offenders and the severity of this type of punishment also reveals that the sentencing practice is constitutional, despite the diminished responsibility of adolescents discussed in *Graham*. Appellant's three aggravated attempted murders, due to their nature and plurality, carried a categorically greater culpability than the single armed burglary in *Graham*. Further, the sentencing practice of allowing the possibility of parole for one aggravated attempted murder, but effectively denying it as to three, promotes the legitimate penological goals of retribution, deterrence, incapacitation, and rehabilitation for juvenile offenders.

The sentencing practice in this case does not come within the specific rule of *Graham*, and it is not otherwise prohibited under the Supreme Court's categorical test for cruel and unusual punishment. Accordingly, this Court should uphold the Court of Appeal's ruling that the trial court's sentence was constitutional.

ARGUMENT

APPELLANT'S SENTENCE IS NOT CRUEL AND UNUSUAL

Appellant contends that under the rule and categorical test of *Graham v. Florida*, his total sentence of 110 years to life for three premeditated attempted murder convictions with gang, firearm, and great bodily injury enhancements violates the federal Constitution as cruel and unusual punishment. But neither the specific rule in *Graham* nor an application of its categorical test renders appellant's sentence unconstitutional. Appellant's total sentence does not come within the *Graham* rule because it

was not punishment for nonhomicide offenses, because it was not life without parole, and because it resulted from an accumulation of separate sentences, each of which was constitutional. Further, appellant fails to meet his heavy burden of showing that his punishment should be declared categorically cruel and unusual because there is no national consensus against this sentencing practice and because the punishment serves legitimate penological goals.

A. *Graham v. Florida*

The Supreme Court framed the issue in *Graham* as whether it was cruel and unusual punishment under the Eighth Amendment, as applied to the states by the Fourteenth Amendment, for "a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime." (*Graham*, *supra*, 130 S.Ct. at pp. 2017-2018.) The issue arose in the context of a Florida state sentence of life without parole for an armed burglary that Terrence Graham committed when he was 16 years old. (*Id.* at pp. 2018-2020.)[7]

After explaining that "proportionality is central to the Eighth Amendment," the Supreme Court unpacked its jurisprudence on cruel and unusual punishment, noting "two general classifications"—proportional and categorical:

> The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

(*Graham*, *supra*, 130 S.Ct. at p. 2021.)

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[7] Graham was also convicted of attempted armed robbery and sentenced to 15 years in prison as a result. (*Graham*, *supra*, 130 S.Ct. at p. 2020.)

Regarding proportional challenges, the Court recounted a two-part test. First, "'[a] court must begin by comparing the gravity of the offense and the severity of the sentence'" and determine whether this comparison "leads to an inference of gross disproportionality . . . ." (*Graham*, *supra*, 130 S.Ct. at p. 2022, quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 1005 [111 S.Ct. 2680, 115 L.Ed.2d 836] (Kennedy, J., concurring in part and concurring in judgment).) Only in "the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality" should the court proceed to the second step rather than reject the claim. (*Id.* at p. 2022.) This second step requires that a court "compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." (*Ibid.*) If the comparison "validates an initial judgment that [the] sentence is grossly disproportionate, the sentence is cruel and unusual." (*Ibid.*, internal quotation marks omitted.)

The second type of challenge, involving "categorical rules," turns on either the "nature of the offense" or "the characteristics of the offender." (*Graham*, *supra*, 130 S.Ct. at p. 2022.) A court resolving a categorical challenge must first consider "objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue." Then, "guided by the standards elaborated by controlling precedents and by the Court's own understanding of the Eighth Amendment's text, history, meaning, and purpose [citation], the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." (*Ibid.*, internal quotation marks omitted.)

The Court then determined whether to apply the proportional test or the categorical test, observing that the issue was one that it had "not considered previously: a categorical challenge to a term-of-years

sentence." The Court wrote that "[a]s a result, a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis." The Court concluded that instead, "the appropriate analysis is the one used in cases that involved the categorical approach . . . ." (*Graham*, *supra*, 130 S.Ct. at pp. 2022-2023, citing *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335] [prohibiting the death penalty for mentally retarded persons], *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1] [prohibiting the death penalty for any defendant who committed the crime while under 18 years of age], and *Kennedy v. Louisiana* (2008) 554 U.S. 407 [128 S.Ct. 2641, 171 L.Ed.2d 525] [prohibiting the death penalty for a nonhomicide crime].)

Addressing the first part of the categorical test, the Court found that a national consensus had developed against sentencing a juvenile to life without parole for a nonhomicide offense. (*Graham*, *supra*, 130 S.Ct. at pp. 2023-2026.) In doing so, the Court initially emphasized that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Id.* at p. 2023, internal citation and quotation marks omitted.) The Court found that 13 states prohibited a life without parole sentence for a juvenile's nonhomicide offense, whereas 37 states, the District of Columbia, and federal law, permitted it under some circumstances. (*Id.* at p. 2023.)[8] Of these 37 states and the other two jurisdictions, however, "only 11 jurisdictions nationwide

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[8] The Court counted California as one of the "jurisdictions that permit life without parole for juvenile nonhomicide offenders." (*Graham*, *supra*, 130 S.Ct. at p. 2034 [Appendix], citing Pen. Code, § 667.7, subd. (a)(2) [LWOP for enumerated felony with three prior prison terms for violent felony convictions]; and see, e.g., Pen. Code, §§ 37 [LWOP for treason], 219 [LWOP for train derailing].)

in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely . . . ." (*Id.* at pp. 2023-2025.)

After finding this community consensus against life without parole sentences for juvenile nonhomicide offenders, the Court found in its "independent judgment" that the practice was cruel and unusual. Under this "independent judgment" test, the Court considered "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question" and also "whether the challenged sentencing practice serves legitimate penological goals." (*Graham*, *supra*, 130 S.Ct. at p. 2026.)

As to the culpability of the offender, the Court reiterated that juveniles were "less deserving of the most severe punishments" because of their "lessened culpability." (*Graham*, *supra*, 130 S.Ct. at p. 2026, citing *Roper*, *supra*, 543 U.S. at p. 569.) Specifically, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." (*Id.* at p. 2026, quoting *Roper*, *supra*, 543 U.S. at p. 570.) As a result, "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" (*Id.* at p. 2026, quoting *Thompson v. Oklahoma* (1988) 487 U.S. 815, 835 [108 S.Ct. 2687, 101 L.Ed.2d 702].)

As to the severity of the punishment in question, the Court observed that "life without parole is 'the second most severe penalty permitted by law.'" (*Graham*, *supra*, 130 S.Ct. at p. 2027, quoting *Harmelin*, *supra*, 501 U.S. at p. 1001.) The Court also saw that "[l]ife without parole is an especially harsh punishment for a juvenile" because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." (*Id.* at p. 2028.)

As to whether the practice served legitimate penological goals, the Court found that although "[c]riminal punishment can have different goals, and choosing among them is within a legislature's discretion . . . none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification" for this practice. (*Graham*, *supra*, 130 S.Ct. at p. 2028, internal citation omitted.) First, retribution is an insufficient goal because the minor's lesser culpability lessens the "community's moral outrage" for a nonhomicide crime. Second, juveniles are less subject to deterrence, and this is especially so where the sentence at issue is rarely imposed. Third, incapacitation does not "override all other considerations" because "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." Fourth, the purpose of rehabilitation does not support the practice because life without parole "makes an irrevocable judgment about that person's value and place in society," which "is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability." (*Id.* at pp. 2028-2030.)

Based on its analysis, the Court concluded that "[t]his clear line" was required for any juvenile sentence of life without parole for a nonhomicide crime. The Court acknowledged that while "[t]he Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life . . . [,] [i]t does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society." (*Graham*, *supra*, 130 S.Ct. at p. 2030.) The Court rejected a case-by-case Eighth Amendment approach to this sentencing practice considering the defendant's age and crimes because it was unconvinced "that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible

juvenile offenders from the many that have the capacity for change." (*Id.* at p. 2032.) Finally, the Court determined that an international consensus confirmed "its independent conclusion" that this practice was cruel and unusual. (*Id.* at pp. 2033-2034.)

B. The *Graham* Rule Does Not Apply To Attempted Murder Or To Specific Term-Of-Years Sentences

As a threshold matter, the rule of *Graham* forbidding a life without parole sentence for a juvenile's nonhomicide offense does not apply to any of appellant's sentences because attempted murder is not considered a nonhomicide offense in this context. The Supreme Court in *Graham* justified its categorical prohibition on a historical demarcation of culpability between those criminals that murder, and those that do not kill or intend to kill. (*Graham*, *supra*, 130 S.Ct. at p. 2027 ["[t]he Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers"]; *ibid.* ["[i]t follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability"].) An attempted murderer does not fall precisely on either side of this traditional line—he or she neither murders yet still intends to kill. Still, the Court's rationale indicates that a juvenile offender convicted of attempted murder is more deserving of serious forms of punishment and does not have the same diminished moral culpability as an offender who did not intend to kill.

Despite these underpinnings for the rule in *Graham*, some language in the Supreme Court's opinion might, in isolation, suggest that only a juvenile's completed homicide would permit a life without parole sentence. In this vein, the Court noted that "[s]erious nonhomicide crimes 'may be devastating in their harm . . . but "in terms of moral depravity and of the

injury to the person and to the public," . . . they cannot be compared to murder in their "severity and irrevocability."' This is because '[l]ife is over for the victim of the murderer,' but for the victim of a very serious nonhomicide crime, 'life . . . is not over and normally not beyond repair.'" (*Graham*, *supra*, 130 S.Ct. at p. 2027, quoting *Kennedy*, *supra*, 128 S.Ct. at p. 2660, quoting *Coker v. Georgia* (1977) 433 U.S. 584, 598 [97 S.Ct. 2861, 53 L.Ed.2d 982]; see *Manuel v. State* (Fla.App. 2010) 48 So.3d 94, 97 [under *Graham*'s bright-line rule, "simple logic dictates that attempted murder is a non-homicide offense because death, by definition, has not occurred"]; Petitioner's Opening Brief ["POB"] 17-19.)

But three passages in *Graham* specifically demonstrate that the Supreme Court included attempted murder in the exempted class of offenses. First, in its discussion about "global consensus," the Court noted that Israel's life without parole sentences for juveniles were not for "nonhomicide crimes" because these juveniles were all "convicted of homicide or *attempted* homicide." (*Graham*, *supra*, 130 S.Ct. at p. 2033, emphasis added.) Second, in listing Hawaii as one of the "jurisdictions that permit life without parole for juvenile offenders convicted of homicide crimes only," the Court cited statutes prescribing life without parole for juveniles convicted of either first degree murder or *attempted* first degree murder. (*Id.* at p. 2035, citing, in the Appendix, Haw. Rev. Stat., §§ 571-22, subd. (d) (2006), 706-656, subd. (1) (2008 Supp. Pamphlet).) Third, "'[n]on-homicide' does not include any convictions for attempted homicides" in the study that the Supreme Court relied on to find that juvenile LWOP sentences for nonhomicide offenses were rare in practice. (Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* (Updated Sept. 14, 2009) Public Interest Law Center, College of Law, Fla. State Univ., p. 4, available at http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092

009.pdf, cited in *Graham*, *supra*, 130 S.Ct. at pp. 2023-2034.) These examples are incompatible with a finding that attempted murder is a nonhomicide according to *Graham*.

Given the basis for *Graham*, the Supreme Court in these three passages evidently considers the danger of the "severity and irrevocability" created by attempted murder sufficient to warrant its inclusion in the homicide exemption. The rule of *Graham* stems from a juvenile's relative immaturity and potential for change. And a juvenile's mental state is at least as culpable for an attempted murder as for a murder. (See *People v. Smith* (2005) 37 Cal.4th 733, 739 [attempted murder requires the specific intent to kill, whereas murder only requires a conscious disregard for life].) Particularly, the punitive goals of incapacitation, retribution, and deterrence would be equally advanced by the elimination of parole regardless of whether the attempt to kill achieved its objective. (See 2 Wayne R. Lafave & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.2, at 22 (1986) ["'the law of attempt exists because there is just as much need to stop, deter and reform a person who has unsuccessfully attempted . . . to commit a crime [as] one who has already committed such an offense,'" quoting Donald Stuart, *The Actus Reus in Attempts*, 1970 Crim.L.Rev. 505, 511].) At bottom, to the Supreme Court, a finding that a juvenile intended and tried to kill outweighs the constitutional concern that the juvenile have no realistic opportunity of parole, for an attempted homicide as well as a homicide.

Moreover, appellant's punishment fell outside of *Graham* because appellant did not receive a life without parole sentence. Although appellant's total sentence may accurately be described as the "functional equivalent" of LWOP (POB 7-16),[9] *Graham* drew a "clear line" between

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[9] In supplemental briefing in the Court of Appeal, respondent termed appellant's total sentence "de facto LWOP" and offered appellant's prison

(continued...)

LWOP and other noncapital sentences (*Graham*, *supra*, 130 S.Ct. at p. 2030). As the Court of Appeal recognized, "'nothing in the Court's opinion [in *Graham*] affects the imposition of a sentence to a term of years without the possibility of parole.'" (Opn. at p. 18, quoting *Graham*, *supra*, 130 S.Ct. at p. 2058 (dis. opn. of Alito, J.); see also *Graham*, *supra*, 130 S.Ct. at p. 2052, fn. 11 (dis. opn. of Thomas, J.) [acknowledging that the Court's opinion includes "only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (*e.g.*, 70 or 80 years' imprisonment)"]; but see *People v. Mendez* (2010) 188 Cal.App.4th 47, 63-64 [finding that although the juvenile offender's 84-years-to-life "sentence is not technically an LWOP sentence, and therefore not controlled by *Graham*," the sentence is "'materially indistinguishable'" from LWOP and therefore is "unconstitutional" based on "the principles set forth in *Graham*"].)

Further, distinguishing between different term-of-years sentences under the Eighth Amendment is a subjective pursuit. (See *Harmelin*, *supra*, 501 U.S. at p. 1001 (Kennedy, J., concurring in part and concurring in the judgment) ["our decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of years"]; *Rummel v. Estelle* (1980) 445 U.S. 263, 275 [100 S.Ct. 1133, 63 L.Ed.2d 382] [the line between death and other punishments is "considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years"].) Given this, it would be unjust and unworkable to hold that under *Graham*, a term-of-years sentence with a parole eligibility date exceeding a juvenile's average life expectancy is equivalent to a life

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(...continued)
"calculation worksheet" indicating that he would not be eligible for parole until he was 122 years old. (Resp. Supp. Br., at p. 3 & Exh. A.)

without parole sentence. (See *Alvarez v. State* (Fla. 1978) 358 So.2d 10, 11-12 ["[m]ortality and life expectancy are irrelevant to limitations on the terms of incarceration set by the Legislature for criminal misconduct"].)[10] The impact of race, sex, health, and incarceration on average life expectancy would be the subject of much debate and litigation, resulting in uncertainty. (See Cristina J. Pertierra, *Do the Crime, Do the Time: Should Elderly Criminals Receive Proportionate Sentences?*, 19 Nova L. Rev. 793, 815-816 (1995) [discussing many possible factors that courts would have to consider in determining a defendant's life expectancy and observing that "courts attempting to predict life expectancies would also face questions regarding the reliability of their predictions"].)[11] And then, mainly because

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[10] Also, selecting the "average" or median life expectancy as the benchmark for determining minimum parole eligibility would still leave about 50 percent of juveniles to die before this period elapses, leaving that half with no possibility of release.

[11] Appellant cites various civil and criminal cases that have adopted a "functional equivalence" rule. (POB 26-28.) But in none of these situations, save perhaps one, would uncertainty result from recognizing a functional equivalent of an existing category. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 494, fn. 19 [120 S.Ct. 2348, 147 L.Ed.2d 435] [a sentencing enhancement is a functional equivalent of an element]; *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 [100 S.Ct. 1682, 64 L.Ed.2d 297] [*Miranda* interrogation exists whenever there is "express questioning or its functional equivalent"]; *March v. Alabama* (1946) 326 U.S. 501, 506-507 [66 S.Ct. 276, 90 L.Ed. 265] [a company-owned town is a functional equivalent of a municipality under the First Amendment right to distribute religious literature]; *In re Jovan B.* (1993) 6 Cal.4th 801, 815 [a house arrest for a juvenile is the functional equivalent of own-recognizance release for an adult]; *Robbins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 910, fn. 5 [a private shopping center is a functional equivalent of a municipality for the purpose of the state constitutional right to petition the government]; but see *In re Christie* (2001) 92 Cal.App.4th 1105, 1109 [noting that because bail is a matter of right, absent enumerated exceptions, "the court may neither deny bail nor set it in a sum that is the functional equivalent of no bail"].) Where uncertainty is a pertinent concern, by

(continued...)

of immutable offender characteristics, some juveniles would have to serve significantly longer prison terms than others based on the same crimes under the same circumstances. (*Id.* at pp. 816-817 [concluding that "[s]peculation with regard to a defendant's life expectancy would result in a lack of uniformity in sentencing"].) Avoiding these types of problems is a key reason for having a bright line rule in the first place.

Ultimately, however, it is unnecessary for this Court to decide whether a juvenile convicted of an attempted homicide may be sentenced to a term of years exceeding his or her life expectancy. As explained below, in California, the punishment for an attempted murder, even if premeditated and even if accompanied with gang, firearm, and great bodily injury enhancements, does not amount to a life without parole sentence. As further explained below, *Graham* is not concerned with the combined effect of sentences. As such, the Court of Appeal correctly rejected appellant's claim that *Graham* bars his sentences in the aggregate.

(...continued)
contrast, this Court has found this factor significant in rejecting claims that a rule should be supplemented with a functional equivalent. (See *Foster-Gardner v. National Union Fire Insurance Company* (1998) 18 Cal.4th 857, 881, 887-888 [adopting a bright-line test in construing the term "suit" rather than a "functional equivalent" approach because this rule "'*reduces* the need for future litigation'"]; *Thing v. La Chusa* (1989) 48 Cal.3d 644, 664, 666 [a "bright line" of liability to nuclear family of victim was necessary in part to prevent burden on courts in applying vaguely defined criteria even though "[s]uch limitations are indisputably arbitrary since it is foreseeable that in some cases unrelated persons have a relationship to the victim or are so affected by the traumatic event that they suffer equivalent emotional distress"].)

C. Cumulative Sentencing Does Not Implicate *Graham* Or The Eighth Amendment

Neither a decision whether to sentence a defendant consecutively for multiple crimes, nor the combined effect of multiple sentences on multiple crimes, implicates the Eighth Amendment prohibition against cruel and unusual punishment. Rather, as long as the sentence for each crime is constitutional, the total sentence is constitutional. A contrary rule would mean that a person could create an Eighth Amendment claim solely by committing additional crimes.

Nothing in *Graham* or its precedents suggests that the Eighth Amendment requires an examination of the combined effect of punishment on multiple criminal offenses. In fact, the cases suggest the opposite. The Supreme Court in *Graham* specifically confronted the constitutionality of a juvenile's life without parole sentence for "*a* nonhomicide crime." (*Graham*, *supra*, 130 S.Ct. at pp. 2017-2018, emphasis added; accord, *id.* at p. 2023 ["[t]he instant case concerns only those juvenile offenders sentenced to life without parole sentence solely for *a* nonhomicide offense"], emphasis added; *id.* at p. 2030 ["those who were below [the age of 18] when the *offense* was committed may not be sentenced to life without parole for *a* non-homicide crime"], emphasis added; *id.* at p. 2032 ["[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive a sentence of life without parole for *a* nonhomicide crime"], emphasis added and internal quotation marks omitted; *id.* at p. 2033 ["[t]he State has denied him any chance to later demonstrate that he is fit to rejoin society based *solely on a* nonhomicide crime"], emphasis added.) And although Graham was also sentenced to 15 years in prison for an attempted armed robbery, the Court solely determined whether the life without parole sentence for his armed burglary was allowable. (*Id.* at p. 2020.)

Almost 120 years earlier, in the case of *O'Neil v. Vermont* (1892) 144 U.S. 323 [12 S.Ct. 693, 36 L.Ed.2d 693], the Supreme Court, while declining to reach the Eighth Amendment issue because it was not properly raised, quoted the Vermont Supreme Court's opinion rejecting O'Neil's cumulative cruel and unusual punishment claim because his aggregate prison sentence of 19,914 days was the result of his conviction of numerous offenses, and because the sentence for each crime was within constitutional limits:

> "The punishment imposed by statute for the offense with which the respondent, O'Neil, is charged, cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty, it is simply because he has committed a great many such offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a single offense, the constitutional question might be urged; but here the unreasonableness is only in the number of offenses which the respondent has committed."

(*Id.* at p. 331, quoting *State v. Four Jars of Intoxicating Liquor* (Ver. 1886) 2 A. 586, 593.)

More recently, the high court echoed this reasoning in rejecting an argument that the Court should evaluate the combined sentences of multiple crimes in resolving the Eighth Amendment claim. In *Lockyer v. Andrade* (2003) 538 U.S. 63 [123 S.Ct. 1166, 155 L.Ed.2d 144], the Court held on federal habeas review that it was not an unreasonable application of clearly established Supreme Court law to reject an Eighth Amendment challenge to a Three Strikes Law sentence. Replying to the dissent's arguments, the Court ruled that it could not "say that the state court's affirmance of two

sentences of 25 years to life in prison was contrary to our clearly established precedent." (*Id.* at p. 74, fn. 1.) The Court emphasized, further, that Andrade's punishment for each crime was separate and should be considered separately:

> Moreover, it is not true that Andrade's "sentence can only be understood as punishment for the total amount he stole." *Post*, at 1176. To the contrary, California law specifically provides that *each* violation of Cal. Penal Code Ann. § 666 (West. Supp. 2002) triggers a separate application of the three strikes law, if the different felony counts are "not arising from the same set of operative facts." § 667(c)(6) (West. 1999); see also § 667(e)(2)(B). Here, Andrade was sentenced to two consecutive terms under California law precisely because the two thefts of two different Kmart stores occurring two weeks apart were two distinct crimes.

(*Andrade*, *supra*, 538 U.S. at p. 74, fn. 1; cf. *Oregon v. Ice* (2009) 555 U.S. 160, ___ [129 S.Ct. 711, 714-715, 172 L.Ed.2d 517] [the Sixth Amendment right to jury trial is "offense-specific" and applies only to "a specific statutory offense"; it does not apply to the decision whether to sentence consecutively].)

Under this authority and reasoning, several state supreme courts and federal courts of appeals have held that cumulative or consecutive sentencing does not implicate the Eighth Amendment prohibition against cruel and unusual punishment. (*Rooney v. State* (Ga. 2010) 690 S.E.2d 804, 810; *State v. Hairston* (Ohio 2008) 888 N.E.2d 1073, 1077-1080; *State v. Buchhold* (S.D. 2007) 727 N.W.2d 816, 824; *State v. Berger* (Ariz. 2006) 134 P.3d 378, 384; *Close v. People* (Colo. 2002) 48 P.3d 528, 540; *United States v. Hong* (4th Cir. 2001) 242 F.3d 528, 532; *Pearson v. Ramos* (7th Cir. 2001) 237 F.3d 881, 886; *Hawkins v. Hargett* (10th Cir. 1999) 200 F.3d 1279, 1285, fn. 5; *State v. August* (Iowa 1999) 589 N.W.2d 740, 744; *United States v. Aiello* (2d Cir. 1988) 864 F.2d 257, 265; *United States v. Schell* (10th Cir. 1982) 692 F.2d 672, 675.) As the Seventh Circuit

explained, "it is wrong to treat stacked sanctions as a single sanction [because] [t]o do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim." (*Pearson v. Ramos*, *supra*, 237 F.3d at p. 886; accord, *Close v. People*, *supra*, 48 P.3d at p. 539 [finding that allowing an Eighth Amendment challenge to cumulative sentences would create "the possibility that a defendant could generate an Eighth Amendment disproportionality claim simply because that defendant had engaged in repeated criminal activity"]; *United States v. Schell*, *supra*, 692 F.2d at p. 675 ["[t]aken to its extreme, it would require us to find that virtually any sentence, however, short, becomes cruel and unusual punishment when the defendant was already scheduled to serve lengthy sentences for prior convictions"].) And, as the Arizona Supreme Court noted, "[t]his proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences." (*State v. Berger*, *supra*, 134 P.3d at p. 479.) Persuaded by these authorities, the Ohio Supreme Court concluded, "Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment." (*State v. Hairston*, *supra*, 888 N.E.2d at p. 1078.)

In this Court's jurisprudence in this area, cumulative sentencing has not generated a viable Eighth Amendment claim as long as the sentence for each count is within statutory limits; rather, a trial court's decision to sentence consecutively has only been reviewed for abuse of discretion. In *In re Adams* (1975) 14 Cal.3d 629, the defendant claimed that his consecutive sentences for sale of benzedrine and transportation of heroin constituted cruel and unusual punishment. (*Id.* at pp. 632, 637.) This Court rejected the claim, finding that "the six-year mandatory minimum term

arises by reason of the trial court's discretionary judgment to impose consecutive sentences for separate criminal offenses." (*Id.* at p. 637.) Because there was no "abuse of discretion in this regard," the court refused "to invalidate consecutive mandatory minimum sentences . . . ." (*Ibid.*; see also *People v. White* (1976) 16 Cal.3d 791, 797 [rejecting the defendant's claim under the California Constitution that it was cruel or unusual punishment to run the sentence for his current conviction consecutively to his two previous sentences, because "it is in the discretion of the trial court whether to make the sentence for the underlying offense run concurrently with, or consecutively to, any incompleted prior sentences"].)

In contrast, the California Court of Appeal has typically entertained (and usually rejected) Eighth Amendment challenges to aggregate sentences. But none of these cases have confronted the uncontested reasoning of the courts holding that consecutive sentences cannot constitute cruel and unusual punishment as long as each sentence is within constitutional limits. (See, e.g., *People v. Leon* (2010) 181 Cal.App.4th 452, 469; *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230-1231; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 569-570; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137.) In 1975, the Court of Appeal, however, explicitly found that a consecutive sentencing decision was reviewable as cruel or unusual punishment under article I, section 6, of the California Constitution. (*People v. Keogh* (1975) 46 Cal.App.3d 919, 928-933; but see *People v. Tipton* (1954) 124 Cal.App.2d 213, 217 [rejecting claim that consecutive sentences were unconstitutionally "cruel and inhuman" because the sentence for each count was within statutory limits and "[t]he trial court possesses the discretion to determine whether the sentences should be consecutive or concurrent"].) The court in *Keogh* reasoned:

> There appears to be no logical reason why a defendant may not raise for appellate determination the issue of whether consecutive sentences imposed upon him produce a resulting penalty so severely disproportionate, irregular and unfair in relation to his crimes that it constitutes an infringement of his right to be free from "cruel or unusual punishment."

(*People v. Keogh*, *supra*, 46 Cal.App.3d at p. 931.)

The cursory reasoning of the *Keogh* court is not persuasive on this issue. First, the claim in *Keogh* arose under the state Constitution, and appellant's claim is based on the federal Constitution. "Whereas the federal Constitution prohibits cruel 'and' unusual punishment, California affords *greater* protection to criminal defendants by prohibiting cruel 'or' unusual punishment." (*People v. Haller* (2009) 174 Cal.App.4th 1080, 1092, italics added, citing *In re Lynch* (1972) 8 Cal.3d 410, 424.) Further, the Supreme Court's *O'Neil* and *Andrade* opinions indicate that the Eighth Amendment applies only to sentences for individual crimes. And, contrary to what *Keogh* says, there is a compelling reason why this is so, namely that "it is wrong to treat stacked sanctions as a single sanction [because] [t]o do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim." (*Pearson v. Ramos*, *supra*, 237 F.3d at p. 886.) This Court should join the state supreme courts and federal appellate courts determining that cumulative sentencing does not implicate the Eighth Amendment's prohibition against cruel and unusual punishment.

Here, appellant's three attempted murders and gang, firearm, and great bodily injury enhancements resulted in sentences of 40 years to life as to the victim Adrian Bautista, and 35 years to life each as to the victims Carlos Vargas and Vincent Valle. As the Court of Appeal correctly found, the longest of these sentences, 40 years to life, is "a term that could be completed within the lifetime of a youthful offender." (Opn. at p. 20,

fn. 7.) Each of appellant's sentences did not run afoul of *Graham* even though, when considered in the aggregate, they would likely exceed appellant's life. Were the rule otherwise, "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." (Opn. at p. 20.) Indeed, implicit in *Graham* is the rationale that a juvenile must be given the opportunity for a second chance upon committing a nonhomicide crime, but not for a third or fourth chance upon committing additional nonhomicide crimes. Because each of appellant's sentences for his three offenses did not amount to life without the possibility of parole, *Graham* was not offended.

D. No New Categorical Eighth Amendment Prohibition Is Warranted

As discussed in the preceding sections, appellant's punishment did not violate the rule of *Graham* for three independent reasons: (1) his attempted murders are not considered nonhomicide offenses; (2) appellant was not given a term of life without parole as to any of his convictions; and (3) cumulative or consecutive sentencing does not implicate the Eighth Amendment, even if the aggregate sentence is the functional equivalent of life without parole. Furthermore, apart from the specific rule in *Graham*, an application to appellant's case of the Supreme Court's categorical standard demonstrates that his sentence is not barred by the Eighth Amendment.

Preliminarily, this Court should rule that appellant's claim under the Eighth Amendment's categorical test fails because it is based solely on the effect of the aggregation of sentences for specific crimes in this case. As explained above, consecutive or cumulative sentencing does not implicate

the Eighth Amendment. And as shown above, each of appellant's sentences does not amount to life without parole. Therefore, appellant's sentences, taken together, do not constitute cruel and unusual punishment.

Nor, under the Supreme Court's categorical test for Eighth Amendment challenges, should a new rule be created to prohibit appellant's aggregate sentence. Under that test, the court first considers "'objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue.'" (*Graham*, *supra*, 130 S.Ct. at p. 2022, quoting *Roper*, *supra*, 543 U.S. at p. 572.) Next, the court "determine[s] in the exercise of its own independent judgment whether the punishment in question violates the Constitution." (*Ibid.*) A defendant carries the "heavy burden" of proving that the punishment for the defendant's offense is cruel and unusual. (*Gregg v. Georgia* (1976) 428 U.S. 153, 175 [96 S.Ct. 2909, 49 L.Ed.2d 859]; see also *People v. King* (1993) 16 Cal.App.4th 567, 572, citing *People v. Wingo* (1965) 14 Cal.3d 169, 174 [where this Court stated that a defendant had a "considerable burden" in showing a penalty was cruel or unusual under the California Constitution].) Specifically, a defendant carries a "'heavy burden'" of establishing a national consensus against a sentencing practice. (*Stanford v. Kentucky* (1989) 492 U.S. 361, 373 [109 S.Ct. 2969, 106 L.Ed.2d 306], abrogated on another ground in *Roper*, *supra*, 543 U.S. at pp. 574-575, quoting *Gregg*, *supra*, 428 U.S. at p. 175.)

There is no national consensus that a juvenile's cumulative sentence exceeding his life expectancy for three premeditated attempted murders with gang, firearm, and great bodily injury enhancements is cruel and unusual. None of the statutes in the 52 jurisdictions that the Supreme Court cited in *Graham* precluded specific term-of-years (i.e., non-LWOP) prison sentences exceeding juveniles' life expectancies, and none have been

amended since *Graham* to preclude this type of punishment for juveniles. (*Graham*, *supra*, 130 S.Ct. at p. 2034 [Appendix].) By contrast, the Court found that 13 states prohibited the sentencing practice at issue in *Graham*. (*Graham*, *supra*, 130 S.Ct. at p. 2023; see also *Roper*, *supra*, 543 U.S. at pp. 564, 568 [18 states prohibited specific practice and 12 states did not permit capital punishment at all]; *Atkins*, *supra*, 536 U.S. at pp. 314-315 [same as *Roper*]; *Thompson*, *supra*, 487 U.S. at pp. 826, 829 [18 states prohibited practice and 14 states did not permit capital punishment at all].)

Furthermore, all 50 states, the federal system, and the District of Columbia allow for consecutive sentencing. It appears that no jurisdiction categorically prohibits a cumulative term-of-years sentence exceeding a juvenile's life expectancy. (18 U.S.C. § 3584; Ala. Code, § 14-4-9; Alaska Stat. Ann., § 12.55.127; Ariz. Rev. Stat. Ann., § 13-711; Ark. Code Ann., § 5-4-403; Cal. Penal Code, § 669; Colo. Rev. Stat. Ann., § 18-1-408; Conn. Gen. Stat. Ann., § 53a-37; Del. Code Ann., tit. 11, § 3901; D.C. Code, § 23-112; Fla. Stat. Ann., § 921.16; Ga. Code Ann., § 17-10-10; Haw. Rev. Stat., § 706-668.5; Idaho Code Ann., § 18-308; Ill. Comp. Stat. Ann., ch. 730, 5/5-8-4; Ind. Code Ann., § 35-50-1-2; Iowa Code Ann., § 901.8; Kan. Stat. Ann., § 21-6606; Ky. Rev. Stat. Ann., § 532.110[12]; La. Code Crim. Proc. Ann., art. 883; Me. Rev. Stat. Ann., tit. 17-A, § 1256; *Wilson v. Simms* (Md. Ct. Spec. App. 2004) 849 A.2d 88, 97; Mass. Gen. Laws Ann., ch. 279, § 8; Mich. Comp. Laws Ann., § 769.1h; Minn. Stat. Ann., § 609.15; Miss. Code Ann., § 99-19-21; Mo. Stat. Ann., § 558.026; Mont. Code Ann., § 46-18-401; *State v. Tucker* (Neb. 2001) 636 N.W.2d

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[12] The Kentucky consecutive sentencing statute caps "the aggregate of consecutive indeterminate terms" at 70 years. (Ky. Rev. Stat. Ann., § 532.110, subd. (1)(c).) But there is no indication that this statute, which applies to both adults and juveniles in criminal proceedings, was meant to ensure that juveniles potentially survive their sentences.

853, 861-862; Nev. Rev. Stat. Ann., § 176.035; *Duquette v. Warden, New Hampshire State Prison* (N.H. 2007) 919 A.2d 767, 774; N.J. Stat. Ann., § 2C:44-5; N.M. Stat. Ann., § 33-2-39; N.Y. Penal Law, § 70.25; N.C. Gen. Stat. Ann., § 15A-1354; N.D. Cent. Code Ann., § 12.1-32-11; Ohio Rev. Code Ann., §§ 2929.14, 2929.41; Okla. Stat. Ann., tit. 22, § 976; Or. Rev. Stat. Ann., § 137.370; 42 Pa. Cons. Stat. Ann., § 9721; R.I. Gen. Laws Ann., § 12-19-5; *Legare v. State* (S.C. 1998) 509 S.E.2d 472, 476; S.D. Codified Laws, § 22-6-6.1; Tenn. Code Ann., § 40-20-111; Tex. Code Crim. Proc. Ann., art. 42.08; Utah Code Ann., § 76-3-401; Vt. Stat. Ann., tit. 13, § 7032; Va. Code Ann., § 19.2-308; Wash. Rev. Code Ann., § 9.94A.589; W. Va. Code Ann., § 61-11-21; Wis. Stat. Ann., § 973.15; *Loper v. Shillinger* (Wyo. 1989) 772 P.2d 552, 553.) Specifically, no jurisdiction apparently removes a trial court's consecutive sentencing discretion to impose the maximum aggregate sentence on juveniles 16 or older convicted of three attempted murders on three victims. (See N.Y. Penal Law, § 70.30 [limiting maximum consecutive sentences for juveniles under 16]; Wash. Rev. Code Ann., § 13.40.180, subd. (2) [limiting the aggregate of consecutive terms for juveniles to 300 percent of the term imposed for the most serious offense].)

Additionally, appellant has not endeavored to identify any national trend or consensus against lengthy term-of-years sentences for appellant's crimes. In fact, appellant's 35-to-life and 40-to-life prison sentences for each of his premeditated attempted murders are comparable to sentences in several other jurisdictions for similar crimes. (See, e.g., Ala. Code, §§ 13A-4-2, 13A-5-6, subds. (a)(1), (a)(4) [punishment for attempted murder with a firearm is life in prison, or 10 to 99 years, with a 20-year minimum sentence]; Alaska Stat. Ann., § 12.55.125, subd. (b) [penalty for first degree attempted murder is 5 to 99 years]; Ark. Code Ann., §§ 5-3-201, 5-3-203, 5-4-401, 16-90-120 [penalty for attempted first degree

murder is 6 to 30 years, plus up to 15 years for use of a firearm]; Del. Code Ann., tit. 11, §§ 531, 4209 [penalty for attempted murder is life without parole]; Ga. Code Ann., §§ 16-4-6, subd. (a), 16-5-1, subd. (d), 16-5-4, subd. (b), (k)(1), 16-11-106, subd. (b) [penalty for attempted murder is one to 30 years, plus five years for use of a firearm, plus five to 15 years when committed for benefit of gang]; Haw. Rev. Stat., § 706-656, subd. (1) [penalty for attempted first degree murder is life without parole]; Ind. Code Ann., §§ 35-41-5-1, 35-50-2-4, 35-50-2-11 [penalty for attempted murder is 20 to 50 years, with 30 years being advisory, plus five years for use of a firearm]; Mo. Stat. Ann., §§ 558.011, 565.021, 565.050 [penalty for assault with intent to kill with great bodily injury is 10 to 30 years, plus one to three years when committed for benefit of gang]; Mont. Code Ann., §§ 45-4-103, 45-5-102 [penalty for attempted deliberate homicide by a juvenile is life, or a term of 10 to 100 years, plus two to 10 years for use of a firearm, plus one to three years when committed for benefit of gang]; Wyo. Stat. Ann., §§ 6-1-301, 6-1-304, 6-2-101 [penalty for attempted first degree murder is life without parole or life with parole].) Thus, current legislation indicates that there is no national consensus against the sentencing practice at issue.

Although the Supreme Court regards the nation's legislation as the "clearest and most reliable objective evidence of contemporary values" (*Atkins*, *supra*, 536 U.S. at p. 312, internal quotation marks omitted), it has also examined actual sentencing practice to determine if there is any national consensus (*Graham*, *supra*, 130 S.Ct. at p. 2023). With respect to this, appellant points to a study indicating that of 6,807 juveniles in the nation serving life in prison (non-LWOP) sentences as of 2009, 2,623 were incarcerated in California. (POB 20-22, citing The Sentencing Project, *No Exit: The Expanding Use of Life Sentences in America* (July 2009), located at www.sentencingproject.org.) He argues that this "table shows how

disproportionate California's sentencing practice has become." (POB 20.) But nothing in this table indicates how many of these sentences were for homicide, attempted homicide, or nonhomicide offenses. Nor does the table report how many of these life sentences carried a minimum parole date that exceeded the juvenile's life expectancy. The study also does not indicate whether the proportion of juvenile life sentences to adult life sentences in California is higher than in other jurisdictions, or whether a higher number of crimes committed by juveniles in California, particularly among gang members, also correlates to the amount of juveniles in California serving life sentences. In short, the cited statistics fail to show an actual sentencing practice that demonstrates a national consensus against the type of sentence in this case.[13]

That there is no national consensus against the sentencing practice in this case, the Supreme Court has instructed,

> while entitled to great weight, is not itself determinative of whether a punishment is cruel and unusual. In accordance with the constitutional design, the task of interpreting the Eighth Amendment remains our responsibility. The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals.

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[13] Another study appellant refers to, reporting 182 juvenile homicide arrests in California in 2009, is insufficient to show how many juveniles are currently serving life sentences for homicide convictions in California. (See POB 22, citing Cal. Dept. of Justice, *Juvenile Justice in California*, Table 4, Juvenile Felony Arrests, 2009 (July 2010).) In any event, even assuming, as appellant appears to suggest, that this number is typical, the past 15 years would amount to 2,730 juveniles arrested for homicide crimes. In this scenario, a high proportion of the 2,623 juvenile life sentences in California likely would have resulted from homicide convictions.

(*Graham*, *supra*, 130 S.Ct. at p. 2026, internal citations omitted.)

The Court in *Graham* observed that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." (*Graham*, *supra*, 130 S.Ct. at p. 2026.) The Court also recognized that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving than are murderers." (*Id.* at p. 2027.) Considering the diminished culpability of juvenile offenders in general and the diminished culpability of a defendant who commits a nonhomicide crime, the Supreme Court reasoned that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." (*Ibid.*)

Here, appellant's three premeditated attempted murders with gang, firearm, and great bodily injury enhancements demonstrate a categorically greater culpability than Graham's armed burglary. Under *Graham*, because appellant intended to kill in each offense, he was not "categorically less deserving" of severe punishment and did not have "a twice diminished moral culpability" than murderers. Also, a juvenile like appellant who intends to kill, and tries to kill, three different persons, especially in a premeditated fashion, is one whose culpability is at least treble.

Appellant's crimes were even more serious because, as the jury found, they were committed for the benefit of a criminal street gang with the specific intent to promote criminal conduct by gang members. (See Pen. Code, § 186.22, subd. (b)(1).) This Court recently noted that the Legislature has determined that gang "'activities, both individually and collectively, present a clear and present danger to public order and safety . . . .'" (*People v. Albillar* (2010) 51 Cal.4th 47, 55, quoting Pen. Code, § 186.21; see also *id.* at pp. 68-69 (con. opn. of Werdegar, J.) ["[t]he proliferation of criminal street gangs and gang-related crimes is deeply troubling, impacting our neighborhoods, our citizenry and our families, and

threatening the individual personal security of us all. In the California Street Terrorism Enforcement and Prevention Act (the STEP Act), the Legislature has attempted to address this disturbing state of affairs by imposing enhanced punishment"].)

In addition, appellant's personal discharge of a firearm in commission of the crimes under Penal Code section 12022.53, subdivision (c), also elevated their seriousness and increased his culpability. As this Court has determined: "'The legislative intent behind section 12022.53 is clear: "The Legislature finds and declares that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime."'" (*People v. Palacios* (2007) 41 Cal.4th 720, 725, quoting *People v. Garcia* (2002) 28 Cal.4th 1166, 1172, quoting Stats. 1997, ch. 503, § 1.) And this Court has recognized that section 12022.53, subdivision (d), the great bodily injury or death provision, serves the legislative goal "'to deter crimes in which a firearm is used and *to incapacitate those who use firearms in crimes.*'" (*People v. Oates* (2004) 32 Cal.4th 1048, 1057, emphasis in original, quoting Sen. Com. on Public Safety, Analysis of Assem. Bill No. 4 (1997-1998 Reg. Sess. as amended Apr. 28, 1997).) Appellant's discharge of a firearm and infliction of great bodily injury during his crimes heightened his culpability.

As to the severity of the punishment in question, each of appellant's three sentences (40 to life, 35 to life, and 35 to life), in contrast to the life without parole sentence in *Graham*, allowed for the possibility of parole within appellant's lifetime. Although each sentence is lengthy, it does not pose the concern presented in *Graham* of determining at the outset that the juvenile cannot be reformed. It was only by appellant's repeated commission of these offenses on different victims that he subjected himself

to a total penalty that amounted to a sentence with a minimum parole eligibility that should exceed his life.

Further, only where "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation, [citation]—provides an adequate justification" should the sentence at issue be considered grossly disproportionate. (*Graham*, *supra*, 130 S.Ct. at p. 2028.) In this inquiry, "[c]riminal punishment can have different goals, and choosing among them is within a legislature's discretion." (*Ibid.*) In light of the serious nature of the crimes and enhancements, appellant's sentences, considered either individually or cumulatively, serve the legitimate goals of retribution, deterrence, and incapacitation. And, individually, each of his sentences furthers the goal of rehabilitation. Since at least one, and in fact all four, of the goals of punishment are served in this case, his sentence should not be considered grossly disproportionate to his crimes.

First, retribution is "an expression of society's moral outrage at particularly offensive conduct" (*Thompson*, *supra*, 487 U.S. at 836, internal quotation marks omitted), and its "rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender," rendering it a "legitimate reason to punish" (*Graham*, *supra*, 130 S.Ct. at p. 2028, internal quotation marks omitted). Although juveniles generally are considered less culpable than adults for criminal offenses and therefore less deserving of the strictest punishments, the goal of retribution is better served with respect to a lengthy term-of-years sentence where a juvenile commits premeditated attempted murders against three victims with a firearm, to benefit his gang, causing great bodily injury to one of the victims, than in *Graham*, where a juvenile received life without parole for a

single, nonhomicide offense, armed burglary.[14] Under these circumstances, appellant's punishment did reflect the "community's moral outrage" at these crimes. (See *Graham*, *supra*, 130 S.Ct. at p. 2028.)

Second, as to deterrence, the Supreme Court has explained that "the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person" and thus acts as a sufficient deterrent for juveniles that commit homicide. (*Roper*, *supra*, 543 U.S. at p. 572.) Similarly, increasing a sentence to lengthen the minimum parole eligibility date upon each premeditated attempted murder conviction serves to deter a juvenile from trying to kill more people. Therefore, even accounting for a juvenile's "diminished moral responsibility" generally, the sentences for appellant's additional crimes effectively promote deterrence both as to appellant as well as other, potential offenders. In this way, appellant's sentences have a greater deterrent effect then the LWOP sentence for the single, nonhomicide offense in *Graham*.[15]

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[14] A fitting comparison of culpability is therefore not, as appellant contends, merely between attempted murder and murder (POB 16-17), but rather between three aggravated attempted murders and one murder. Respondent also disagrees with appellant's characterization of one of the victims, Bautista, as being "relatively unscathed" from the shooting. (POB 17.) The jury found Bautista had suffered great bodily injury based upon the uncontested evidence that appellant shot him in the back and upper shoulder, causing him to fall to the ground and to bleed from his upper back, nose, and mouth, while having breathing difficulty. Bautista then stayed in the hospital for over a day. Furthermore, appellant's apparent inference that Bautista's recanting at trial showed reasonable doubt as to his guilt (POB 17) flies in the face of appellant's admission of guilt at trial and the uncontradicted testimony from other gang members that "snitches" risk being killed even by their own gang.

[15] Appellant quotes *Sumner v. Shuman* (1967) 483 U.S. 66, 83 [107 S.Ct. 2716, 97 L.Ed.2d 56] for the proposition that "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several

(continued...)

Third, the Supreme Court has described incapacitation as "an important goal" of punishment. Finding it justified, however, requires a determination at the outset that the juvenile is "incorrigible," which is "difficult" to do. (*Graham*, *supra*, 130 S.Ct. at p. 2029.) But just as with murder, a premeditated attempted murder, particularly when committed multiple times with various gang, firearm, and great bodily injury enhancements, ought to permit the sentencing discretion to impose punishment consecutively on the ground that this is a juvenile capable of committing crimes that show "irreparable corruption." (*Roper*, *supra*, 543 U.S. at p. 573.) The trial court's sentence was consistent with this determination, especially considering that while one of appellant's gang rivals was testifying, appellant mouthed, "You're dead," in his direction. (3RT 1235.)

Fourth, regarding rehabilitation, appellant, unlike Graham, was not denied the possibility of regaining his freedom upon showing reformation and penitence for a single offense. At that point, appellant would have had the potential for parole. It was not until he committed additional attempted murders that this opportunity was effectively denied. In this way, as to his sentence for each crime, which is the only relevant inquiry for Eighth Amendment purposes, appellant had a meaningful chance to obtain release in his lifetime. Accordingly, rehabilitation was a fourth goal served by

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(...continued)
sentences of a number of years, the total of which exceeds his normal life expectancy." (POB 8, 27.) The Supreme Court in *Sumner*, however, was evaluating the deterrent value of a sentence (capital punishment) for a crime committed while the inmate already is serving his life without parole or lengthy-term-of-years sentence. (*Sumner*, *supra*, 483 U.S. at pp. 83-84.) By contrast, this case requires an evaluation of whether the goal of deterrence is served before the person commits the additional crimes for which he receives a sentence exceeding his life expectancy.

each punishment in this case. Moreover, given the seriousness of appellant's offenses, rehabilitation was adequately justified by his total sentence in that he retained "his potential to attain a mature understanding of his own humanity" even in prison. (*Roper*, *supra*, 543 U.S. at p. 573.)

Appellant also contends that there is an international consensus against life sentences for juveniles, pointing to the *Graham* Court's conclusion that other nations forbid life without parole sentences for juveniles for nonhomicide offenses and to articles asserting that European nations do not impose lengthy maximum sentences for juveniles even for serious crimes. (POB 22-25.) But whether a juvenile convicted of appellant's offenses would not receive a life sentence in some other parts of the world is not, by itself, material under Supreme Court jurisprudence. International law can only validate the reasoning of an independent conclusion that the sentencing practice is cruel and unusual; international law on its own cannot warrant a categorical prohibition of a sentencing practice. (*Graham*, *supra*, 130 S.Ct. at p. 2034 ["[t]he Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it"].) As there is no national consensus against the sentencing practice at issue in this case, and as the punishment is not indefensibly severe in light of the offender's high culpability, appellant's reliance on international law is unavailing. (See *People v. Mungia* (2008) 44 Cal.4th 1101, 1143 ["California's status as being in the minority of jurisdictions worldwide that impose capital punishment, especially in contrast with the nations of Western Europe, does not violate the Eighth Amendment"].)

Lastly, appellant contends that under *Graham*, the trial court violated the Eighth Amendment by sentencing him without adequately considering his personal circumstances. (POB 29-31.)[16] Initially, appellant has forfeited this claim by failing to object on this ground at sentencing. (3RT 1285-1289; see *People v. Scott* (1994) 9 Cal.4th 331, 354 ["claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner"].)

Were appellant's contention cognizable, however, it would be meritless. Nothing in *Graham* overruled *Harmelin, supra*, 501 U.S. 957, where the Supreme Court squarely rejected a claim that an LWOP sentence was unconstitutional because the trial court did not consider any mitigating factors. The Court in *Harmelin* held that the Eighth Amendment does not require consideration of mitigating factors in noncapital cases.[17] (*Id.* at p. 995; see *Smith v. State* (Alaska App., July 1, 2011) ___ P.3d ___ [2011 WL 2650000, *9] ["the holdings and the reasoning of *Simmons* and *Graham* do not support an across-the-board mitigation of sentences for juvenile offenders who are prosecuted within the adult justice system"]; *Welch v. State* (Tex.App. 2011) 335 S.W.3d 376, 381 ["discussion of a constitutional rule regarding mitigating evidence is conspicuously absent from the decision" in *Graham*]; *Miller v. State* (Ala.Crim.App., Aug. 27, 2010) ___ So.3d ___ [2010 WL 3377692, *9] [because the juvenile "did not receive a sentence of death," his LWOP sentence is not subject to "the

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[16] Appellant's characterization of his crimes as "spontaneous, impulsive, and inexplicable" (POB 30) is contradicted by the jury's findings that the attempted murders were premeditated and committed to benefit his gang. And appellant threatened to kill a prosecution witness during his testimony, confirming an ingrained homicidal nature.

[17] Appellant's citation to *Sumner, supra*, 483 U.S. at p. 85 (POB 29), is inapposite, as that passage dealt with the consideration of mitigating factors at capital sentencings.

individualized-sentencing requirement of the Eighth Amendment"]; but see *People v. Mendez*, *supra*, 188 Cal.App.4th at pp. 65-66 [where, in granting relief based on a proportionality challenge to a juvenile's 84-years-to-life sentence, the court notes that it is "particularly troubled by the fact that the record is silent as to Mendez's personal and family life and upbringing . . . [a]nd it does not appear that the trial court had any such evidence before imposing consecutive sentences"].)

Moreover, a categorical rule, by definition, does not account for the extenuating circumstances of each case. In any event, nothing in the record suggests that the trial court, in exercising its discretion, did not evaluate any potentially relevant sentencing factors, including appellant's age.[18] (See *People v. Stowell* (2003) 31 Cal.4th 1107, 1114 ["where a statement of reasons is not required and the record is silent, a reviewing court will presume the trial court had a proper basis for a particular finding or order"]; Pen. Code, § 664 ["[i]t is presumed that official duty has been regularly performed"]; Cal. Rules of Court, rule 4.409 ["[r]elevant criteria enumerated in these rules must be considered by the sentencing judge, and will be deemed to have been considered unless the record affirmatively reflects otherwise"].)

In sum, this Court should find, in its independent judgment, that consecutively sentencing a juvenile for three counts of premeditated attempted murder and gang, firearm, and great bodily injury enhancements to a total sentence of 110 years to life is not categorically unconstitutional. By so doing, this Court should confirm what objective evidence from

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[18] In the answer to the petition for review of the Court of Appeal's denial of appellant's petition for writ of habeas corpus, respondent argued that appellant's allegations of incompetence at trial and ineffective assistance of counsel for failure to seek further psychiatric evaluations were baseless. This Court subsequently denied appellant's petition for review.

national legislation already demonstrates: there is no consensus against the practice.

CONCLUSION

This Court should affirm the decision of the Court of Appeal affirming appellant's judgment of conviction.

Dated: August 9, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 11,863 words.

Dated: August 9, 2011

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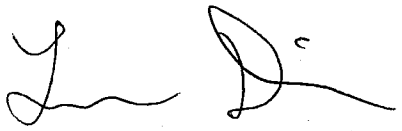

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DECLARATION OF SERVICE BY U.S. MAIL

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 10, 2011, at Los Angeles, California.

Frances Conroy
Declarant

Signature

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