In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JESUS MANUEL RODRIGUEZ et al.,

Defendants and Appellants.

Case No. S239713

Fifth Appellate District, Case No. F065807
Stanislaus County Superior Court, Case Nos. 1085319 / 1085636
The Honorable Nancy Ashley, Judge

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

In granting Barajas's petition for review, the court limited the issues to be briefed to the following:

(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?

INTRODUCTION

The convictions of appellants Rodriguez and Barajas rested largely on the testimony of an accomplice. A conviction cannot be based on the testimony of an accomplice unless the testimony is corroborated by other evidence that tends to connect the defendant with the commission of the offense. (Pen. Code,[1] § 1111.) Rodriguez's own statements and admissions were admitted at trial and sufficiently corroborated the accomplice testimony as to him.

No such statements or admissions from Barajas were admitted, however. Although evidence was presented that Barajas was a Sureño gang member, that evidence could do no more than raise a suspicion against every Sureño gang member in Stanislaus County. None of the other non-accomplice evidence relating to the circumstances of the crime tended to connect Barajas to the commission of the crime. Therefore, respondent is

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[1] All further statutory references are to the Penal Code unless otherwise specified.

constrained to agree that the accomplice testimony was not sufficiently corroborated as to Barajas.

This Court does not have jurisdiction over Rodriguez because he failed to file a petition for review and the court did not order review as to him on its own motion. In any event, Rodriguez's constitutional challenge to his 50-years-to-life sentence is moot because sections 3051 and 4801 provide him with a meaningful opportunity for release on parole after no more than 25 years of imprisonment.[2] The remand in *People v. Franklin*, *supra*, 63 Cal.4th 261 ("*Franklin*"), which was granted to ensure a juvenile offender has had or will receive a sufficient opportunity to present information that will be relevant at an eventual youth offender parole hearing, was statutorily driven, not constitutionally driven. In light of the statutory scheme, remand is not necessary to ensure a meaningful opportunity for release under *Graham v. Florida* (2010) 560 U.S. 48 ("*Graham*"), *Miller v. Alabama* (2012) 567 U.S. 460 ("*Miller*"), and *People v. Caballero* (2012) 55 Cal.4th 262 ("*Caballero*"). Moreover, a contrary rule would be difficult to implement fairly and efficiently. But even though the constitutional claim is moot, remand would nevertheless be required under state law as articulated in *Franklin*.

STATEMENT OF THE FACTS AND CASE

A. Gang-related Drive-by Shooting and Murder

Appellants were tried jointly in 2011 for first degree murder (§ 187), conspiracy to commit murder (§§ 182/187), and active participation in a criminal street gang (§ 186.22, subd. (a)) with firearm and gang enhancements. The case arises from a May 26, 2004 gang-related drive-by shooting and murder of a teenage girl in Oregon Park, a public park located

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[2] Barajas also raises this claim, but respondent does not address it as to him in light of the concession on the accomplice corroboration issue.

in Modesto. The park was known as a Norteño gang hangout. (1RT 106-108, 157-158; 3RT 541; 4RT 736-739, 823.)

1. Accomplice testimony

Mario Garcia, a 17-year-old Sureño gang member at the time of the shooting and an accomplice to the charged crimes, testified for the prosecution in accordance with an agreement to plead guilty to being an accessory after the fact (§ 32). (3RT 527, 529-530, 589-592.) Garcia (aka "Big Worm") testified that his Sureño "home boys" were 15-year-old appellant Jesus Rodriguez (aka "Loco"), 16-year-old appellant Edgar Barajas (aka "Shadow"), and 16-year-old Louis Acosta (aka "Danger"). (3RT 537-540, 610-611.) Acosta lived across the street from Oregon Park in a house located at 429 Thrasher, and Garcia and Barajas each lived just a few blocks away. (3RT 540, 545, 564.) Whenever the Norteños would notice Garcia or his "home boys" hanging out in that area, the Norteños would disrespect them by "talking shit," calling them "scraps," throwing up gang signs, or throwing rocks at them. (3RT 544-547.) Garcia's house had also been shot at a number of times. (3RT 606.)

On May 20, 2004, Acosta was assaulted by Norteños in the park. (3RT 543-544; 4RT 772-773.) The Norteños jumped Acosta, broke his arm, threw rocks at him, broke the windows of his van and, before fleeing, fired a small black semi-automatic handgun at Acosta. (3RT 543-544; 4RT 772-773.) Five days later, Norteños chased Rodriguez, Garcia, and Acosta and then used a baseball bat to break out the windows of Rodriguez's Chevy Blazer while it was parked at Acosta's house. (3RT 499, 501-502, 547-553.) The Sureño gang members felt disrespected and wanted revenge. (3RT 554-556, 561.)

On May 26, 2004, according to Garcia, Garcia called Barajas to acquire a gun. (3RT 561-562.) Rodriguez, Garcia, and Barajas rode in the Blazer to a Modesto barrio to pick up a firearm. (3RT 562-565.) Barajas

got out of the vehicle and returned with a .22-caliber rifle. (3RT 566.) On the ride back to Garcia's house, the three discussed getting revenge on the Norteños. (3RT 568-570.) After a short stop, fellow gang members Pedro Castillo and Rigoberto Moreno joined them in the car. (3RT 570-572.) They drove away in search of Norteños. (3RT 577.) Rodriguez drove, Castillo sat in the front passenger seat with a blue bandana over his face, Garcia sat by a broken rear window with Moreno next to him, and Barajas sat in the rear cargo area holding the .22-caliber rifle. (3RT 572-576.)

Garcia testified that he, Rodriguez, Barajas, Moreno, and Castillo passed through Oregon Park looking for Norteños. (3RT 577.) Garcia saw someone by the gazebo who he thought was a Norteño because the person was wearing red. (3RT 577-579.) As the Blazer approached the gazebo, Garcia heard Barajas shout "puro Sur." (3RT 580.) Barajas then fired multiple shots. (3RT 580.) After Barajas stopped shooting, they sped off. (3RT 580.) Garcia did not recall any shots being fired from the park at the Blazer. (3RT 581-582.)

Rodriguez made statements to law enforcement that were also admitted into evidence. He admitted that he had been driving the Blazer when the shooting occurred and claimed that he had put the rifle in the back of the Blazer. (3RT 497-500, 502.) Approximately 15 shots were fired as the shooter yelled out "puro sur trece." (3RT 502-503, 511.) He confirmed that the shooting was retaliation for the Norteños breaking the windows of his Blazer. (3RT 499-502, 504.) After the shooting, he drove to a fellow gang member's house. (3RT 507-508.)

2. Other evidence

Several witnesses at the park testified to the circumstances of the crime. At the time of the shooting, approximately 80 children, including some Norteños, were gathered at Oregon Park for an after-school recreational program conducted by Gina Lopez and the Police Activities

League. (1RT 209-212, 217-218, 223-224.) The victim, Ernestina Tizoc (Tina), who was not considered to be a Norteño, was sitting under the gazebo with Nadia O., Charlene S., and some other friends. (1RT 109, 115-116, 118-120, 165-166; 2RT 223, 227.) A white Blazer with smashed-out windows and at least two or three occupants circled the park twice. (1RT 121-125, 163, 167-168; 2RT 230, 234-238.) Nadia saw the occupants throw up "13," a Sureño hand sign. (1RT 122-124.) Nadia and Charlene noticed one of them wearing a dark bandanna over his face. (1RT 126, 168.) Lopez heard one of the occupants shout "puro Sur" (2RT 231), and Charlene also heard one of the occupants yell "gang-related stuff" (1RT 169).

When the Blazer approached the gazebo, one of the occupants pulled out a gun and fired several shots toward the gazebo. (1RT 131-132, 172-173, 176; 2RT 239.) Tina screamed and yelled, "It hit me, it hit me." (1RT 135, 173, 176; 2RT 239-240, 243-244.) Within 20 minutes, Tina died. (2RT 431, 437.)

Stanislaus County Sheriff's Deputy Vincent Hooper responded to 429 Thrasher based on information that someone at the residence was possibly involved in the shooting. (2RT 282-284.) Several individuals were present at the residence and were detained pending further investigation. (2RT 283-284.) Mail addressed to Acosta, gang-related drawings, and some .22-caliber rounds in a nightstand were found in a subsequent search of the residence. (3RT 461-464.)

Bullet fragments were located under the gazebo. (2RT 302, 327.) A white Chevy Blazer with shattered windows was located in an alley off Fortuna Avenue. (2RT 284-287.) A bag of bullets was found under an old tire in the vicinity of the Blazer. (2RT 327-328.) Three .22-caliber casings and one live .22-caliber bullet were found in the backyard of a Fortuna Avenue residence and another .22-caliber casing was found in the backyard

of a second nearby residence. (2RT 301, 328-330; 3RT 467.) Rodriguez also led law enforcement to a dairy where a .22-caliber rifle was located. (2RT 301, 324-326, 3RT 465, 511.) A criminalist testified that the three shell casings from the Fortuna Avenue residence had been fired from the rifle (2RT 372-373) and that the bullet recovered from Tina's body could have been fired from the rifle (2RT 377-378, 392-393).[3]

Froilan Mariscal, an investigator for the district attorney's office, testified as a gang expert. (4RT 717-727.) In 2004, it was estimated that there were between 600 and 1,000 Sureño gang members in Stanislaus County. (4RT 747, 835.) Based on Mariscal's investigation, he believed that Barajas, Rodriguez, Castillo, and Moreno were Sureño gang members on May 26, 2004. (4RT 748-765, 776-777, 812.) Mariscal's opinion as to Barajas was based in part on three discipline reports from Elliott Continuation School. (4RT 748-749.) In one incident, Barajas had been involved in a fight with gang overtones. (4RT 749.) In another incident, Barajas wore blue after being told not to. (4RT 749.) In a third incident, Barajas was again involved in a gang-related fight. (4RT 749.) Mariscal also testified to several gang-related incidents of violence against Acosta's residence. (4RT 766-773.) Mariscal testified that, given the prior assaults, insults, and physical violence the Norteños had demonstrated toward the Sureños, he would expect the Sureños to respond with violence to avoid losing credibility. (4RT 775-776.) Based on a hypothetical fact pattern mirroring the facts of this case, Mariscal believed that a drive-by shooting by Sureño gang members under such facts would have been intended to

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[3] The prosecution also presented evidence about certain admissions, statements, and responses that Barajas made to law enforcement. (2RT 321, 327-329; 3RT 465-467.) But due to a defective *Miranda* admonition (*Miranda v. Arizona* (1966) 384 U.S. 436), the trial court struck the evidence and instructed the jury to disregard it. (4RT 713-715, 859-860; 5RT 1099-1100, 1168; 2CT 425.)

benefit the gang by instilling fear in rival gang members and enhancing the violent reputation of the gang in the community at large. (4RT 778-780.)

B. Convictions and Sentencing

In May 2011, appellants were each found guilty of first degree murder (§ 187), conspiracy to commit murder (§§ 182/187), and active participation in a criminal street gang (§ 186.22, subd. (a)) with firearm and gang enhancements. (2CT 501-512.) Shortly thereafter, the probation department submitted reports and recommendations for appellants. (2CT 528-548 [Rodriguez], 549-569 [Barajas].) Rodriguez's attorney declined to have Rodriguez interviewed for the report, so the information regarding Rodriguez's statement about the crime and his social history, including his youthful background, was extracted from a 2004 fitness hearing report (2SCT 1-21). (2CT 542.)

In 2012, both the United States Supreme Court and this Court issued relevant decisions concerning the sentencing of juvenile offenders. In *Miller*, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." (*Miller*, *supra*, 567 U.S. at p. 479.) Two months later, this Court declared in *Caballero* that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*Caballero*, *supra*, 55 Cal.4th at p. 268.)

After *Miller* and *Caballero* were decided, Rodriguez filed an opposition to the probation report in which he briefly argued that he was "very young at the time of the shooting," that he had "been in custody for several years without incident," and that the court should strike the firearm enhancement based on the facts and circumstances of the case and his good conduct exhibited while in custody. (3CT 771-774.) The trial court

subsequently sentenced both Barajas and Rodriguez to aggregate indeterminate terms of 50 years to life, based on a term of 25 years to life for first degree murder and a consecutive term of 25 years to life for the section 12022.53, subdivisions (d) and (e)(1), enhancements. (5RT 1251; 3CT 781, 783.) The court read and considered the probation report but did not expressly consider any youth-related factors on the record. (5RT 1249-1251.)

C. Appeal to the Fifth District Court of Appeal

On appeal, Barajas argued that the accomplice testimony was not sufficiently corroborated. Both Barajas and Rodriguez argued that their sentences of 50 years to life constituted cruel and unusual punishment in violation of the Eighth Amendment. Specifically, they argued that their mandatory indeterminate terms were the functional equivalent of a life-without-the-possibility-of-parole (LWOP) term requiring the trial court to engage in a proportionality review pursuant to *Miller* and *Caballero*.

The Fifth District Court of Appeal affirmed the judgments in case number F065807. The court held that the accomplice testimony was sufficiently corroborated as to Barajas. It also rejected appellants' sentencing claims, holding that their sentences were not the functional equivalent of a life term and thus did not require a proportionality analysis under *Miller*.

D. Review in the California Supreme Court (Case No. S225231)

On June 10, 2015, this Court granted petitions for review of both Barajas and Rodriguez and deferred further action pending consideration and disposition of related issues in *In re Alatriste*, S214652, *In re Bonilla*, S214960, *People v. Franklin*, S217699, and *People v. Romero and Self*, S055856. (Case no. S225231.) In *People v. Romero and Self, supra*, 62 Cal.4th at pages 31 to 37 ("*Romero and Self*"), the court held that the

corroboration of accomplice testimony was sufficient as to certain crimes against two particular victims and insufficient as to a robbery against a third victim. In *Franklin, supra*, 63 Cal.4th at page 268, the court held that sections 3051 and 4801, which provided Franklin with the possibility of release after 25 years of imprisonment and required the Board of Parole Hearings (BPH) 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," mooted his constitutional claim under *Miller*. The court in *Franklin* also remanded the case to permit the trial court to determine whether Franklin had been afforded sufficient opportunity at sentencing to make a record of mitigating evidence tied to his youth. (*Id.* at p. 269.)

E. The Fifth District Court of Appeal after Transfer

This Court transferred the matter back to the Fifth District Court of Appeal with directions to vacate its decision and reconsider the cause in light of *Franklin, supra*, 63 Cal.4th at page 269 as to Rodriguez and in light of *Franklin, supra*, 63 Cal.4th at page 269, and *Romero and Self, supra*, 62 Cal.4th 1 as to Barajas.

Without additional briefing, the Fifth District Court of Appeal again affirmed the judgments. The court again relied on the non-accomplice evidence of Barajas's gang membership and the circumstances of the crime, including non-accomplice testimony and physical evidence, to find that the accomplice testimony was sufficiently corroborated. The court also held that appellants' constitutional sentencing claims under *Miller* were moot in light of *Franklin*. The court did not, however, remand the case to permit the trial court to determine whether appellants had been afforded a sufficient opportunity at sentencing to make a record of mitigating evidence that may be relevant at a future youth offender parole hearing.

This Court granted Barajas's petition for review. Rodriguez did not file a petition for review. Counsel was appointed for both Barajas and Rodriguez.

ARGUMENT

I. THE ACCOMPLICE TESTIMONY WAS NOT SUFFICIENTLY CORROBORATED AS TO BARAJAS

Accomplice Garcia testified that Barajas was the person who had obtained the rifle that was used in the shooting and that Barajas was the shooter. The only other evidence the jury could have considered that directly related to Barajas was the gang expert's opinion that he was a gang member and the evidence supporting that opinion.[4] Barajas now contends that Garcia's testimony was not sufficiently corroborated under section 1111. (BOBM[5] 25-48.) Respondent is constrained to agree.[6]

Section 1111 governs the evidence that is required to corroborate the testimony of an accomplice:

> A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

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[4] A defense witness testified that he knew Barajas because they were held in custody together at the Public Safety Center (4RT 946-948), but that fact is irrelevant to the current issue on appeal.

[5] Respondent will refer to Barajas's Opening Brief on the Merits as "BOBM" and Rodriguez's Opening Brief on the Merits as "ROBM."

[6] Rodriguez properly admits that this issue on review does not apply to him. (ROBM 19-20.) His statements and admissions were admitted at trial (3RT 497-504, 507-511, 513-519, 521-526) and sufficiently corroborated Garcia's testimony. (See *People v. Davis* (2005) 36 Cal.4th 510, 546-547.)

It is undisputed that Garcia was an accomplice as a matter of law. (See 2CT 430-431.)

Romero and Self articulates the relevant law concerning accomplice corroboration. For a jury to rely on an accomplice's testimony about the circumstances of an offense, it must find evidence that independently, "without aid from the accomplice's testimony, tend[s] to connect the defendant with the crime." (*Romero and Self, supra*, 62 Cal.4th at pp. 32, 36, quoting *People v. Abilez* (2007) 41 Cal.4th 472, 505, internal quotation marks omitted.) The entire conduct of the parties, including their relationship and their acts, may be considered by the jury in determining the sufficiency of the corroboration. (*Romero and Self*, at p. 32.) The evidence need not independently establish the identity of the victim's assailant nor corroborate every fact to which the accomplice testifies, and may be entitled to little consideration when standing alone, but it must reasonably tend to connect the defendant with the commission of the crime. (*Id.* at pp. 32-33.) An accomplice's testimony is not corroborated by the circumstance that the testimony is consistent with a non-accomplice's description of the crime or physical evidence from the crime scene unless the corroboration connects the defendant to the crime. (*Id.* at p. 36.)

Here, the court of appeal opinion relied on non-accomplice testimony establishing the circumstances of the crime—pieces of physical evidence, and the gang expert's testimony and opinion that Barajas was a gang member—to corroborate Garcia's accomplice testimony. Indeed, numerous eyewitnesses testified to the circumstances of the shooting, even if they could not identify the perpetrators beyond their Sureño gang membership. A great deal of physical evidence, including the murder weapon and shell casings that were fired from that weapon, was also presented. But Barajas was not connected to that evidence in any way apart from Garcia's testimony.

The strongest admissible[7] non-accomplice evidence potentially connecting Barajas to the crime was the gang expert's opinion that Barajas was a Sureño gang member. (4RT 748-749.) It was undisputed that the shooting was committed by Sureño gang members. However, the gang expert's testimony failed to personally connect Barajas to the shooting itself, the physical evidence, the accomplices and victims involved, the vehicle used by the perpetrators, or any particular location related to the crime such as Oregon Park, Acosta's residence, and the areas where physical evidence was found. Apart from Garcia's testimony, there was nothing to suggest that the crime was committed by Barajas rather than any other of the hundreds of Sureño gang members in Stanislaus County. (4RT 747, 835.)

A brief comparison of a few cases is instructive. In *Romero and Self*, a robbery victim testified that the robber had brandished what appeared to be a sawed-off shotgun. (*Romero and Self, supra*, 62 Cal.4th at p. 35.) According to the accomplice, the shotgun had belonged to Self, who had sent Romero with the gun to commit the robbery. (*Ibid.*) Although Self admitted that he had possessed a shotgun for a month prior to the robbery, that circumstance was insufficient to corroborate the accomplice's testimony that Self was present at the robbery. (*Id.* at pp. 35-37.)

Romero and Self approvingly discussed the 147-year-old case *People v. Ames* (1870) 39 Cal. 403. (*Romero and Self, supra*, 62 Cal.4th at pp. 36-37.) In *Ames*, two robbery victims testified that one of the robbers was referred to by another robber as "Charley." (*People v. Ames, supra*, 39 Cal. at pp. 403-404.) The accomplice testified that the defendant, Charles G. Ames, was usually known as "Charley." (*Id.* at pp. 404-405.) The court

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[7] Barajas's admissions and statements to law enforcement would have provided sufficient corroboration had they not been stricken.

held that the testimony of the victims did not tend to connect the defendant with the commission of the offense because it did no more than raise a suspicion against every man in Los Angeles County named Charles. (*Ibid.*)

Accomplice testimony was found to be sufficiently corroborated in *People v. Szeto* (1981) 29 Cal.3d 20. In *Szeto*, members of the Joe Boys gang shot and killed several people at a restaurant in an attempt to gain revenge on rival gang members for killing a fellow Joe Boys gang member two months earlier. (*Id.* at pp. 26, 28.) An accomplice explained that the defendant, who was charged with being an accessory to a felony and possessing a sawed-off shotgun, had disposed of the guns used in the shooting. (*Id.* at pp. 25, 27-28.) The court held that the accomplice testimony was corroborated by independent evidence that the defendant had a motive to aid the killers and had the opportunity to commit the charged crimes. (*Id.* at pp. 27-29.) The non-accomplice evidence established that the defendant was a member of the Joe Boys gang, had attended the funeral of his fellow gang member two months earlier, was present in the same house as the killers on the morning of the shooting before the guns had disappeared, and had worked in the area where the guns were ultimately abandoned. (*Id.* at pp. 28-29.)

The relevant facts of this case are remarkably similar to the facts in *People v. Pedroza* (2014) 231 Cal.App.4th 635, which found a lack of sufficient corroboration of accomplice testimony. In *Pedroza*, the only evidence relating to the defendant aside from the accomplice's testimony was (1) the defendant was in the same gang as the victim and the accomplice, (2) the gang, which had over 400 members, was experiencing frequent in-house murders, and (3) a few hours after the crime occurred, the defendant was seen with the accomplice at a fellow gang member's house approximately 30 miles from the scene of the crime. (*Id.* at pp. 639, 651.) *Pedroza* explained that the independent evidence merely established that

the defendant had a general connection to the victim and the other perpetrators via their shared gang membership and did not connect the defendant with the crimes themselves. (*Id.* at p. 651.) Shared gang membership, without more, did not tend to establish that the defendant had a motive to commit the crimes. (*Id.* at p. 654.) Although other aspects of the accomplice's testimony were corroborated by independent evidence, none of that evidence tended to connect the defendant to the crimes. (*Id.* at pp. 652-653.)

The corroborating evidence in this case was even weaker than it was in *Pedroza*. The non-accomplice evidence did not tend to connect Barajas to the accomplice, his codefendant, or the victims. Nor did it tend to connect Barajas to the Chevy Blazer used during the shooting, the murder weapon, or any of the bullets and shall casings that were recovered. There was no evidence tending to connect Barajas to Oregon Park, the 429 Thrasher residence, or any of the locations where relevant evidence was found. There was also no evidence that Barajas had been involved in any of the prior acts of violence committed by the Norteños against the Sureños that preceded the charged crimes. And other than fights at school, the evidence did not show that Barajas had committed acts of violence against Norteños similar to the shooting at the park. Unlike in *Szeto*, there was no evidence establishing a personal motive or opportunity to commit the charged crimes. The corroborating evidence that was presented could do no more than establish the crimes occurred and raise a suspicion against every Sureño gang member in Stanislaus County. Any of the above pieces of evidence, had they been presented to the jury, may have tended to connect Barajas to the commission of the crimes in this case. But without any such evidence, respondent is constrained to agree that the accomplice testimony was not sufficiently corroborated.

Respondent does, however, take issue with two arguments made in Barajas's Opening Brief on the Merits. Barajas argues that evidence of corroboration must show personal guilt to satisfy due process (BOBM 26, 41, 45, citing *Scales v. United States* (1961) 367 U.S. 203), but that is not the case. Whereas section 1111 requires evidence of corroboration that tends to connect the defendant to the commission of the crime, the United States Constitution does not. The due process requirement that criminal liability rest on personal guilt (see *People v. Castenada* (2000) 23 Cal.4th 743, 749) was satisfied in this case by Garcia's testimony that directly implicated Barajas.

Respondent also disputes the claim that evidence of motive may not constitute corroboration of accomplice testimony in an appropriate case. (BOBM 45-46.) Evidence of motive may tend to connect the defendant to the commission of the charged offense. (§ 1111.) And California courts have repeatedly relied upon evidence of motive to corroborate accomplice testimony. (See, e.g., *People v. McDermott* (2002) 28 Cal.4th 946, 986; *People v. Heishman* (1988) 45 Cal.3d 147, 165; *People v. Szeto, supra*, 29 Cal.3d at p. 28; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1178; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1022; see also *People v. Pedroza, supra*, 231 Cal.App.4th at pp. 654-656 [suggesting independent evidence of motive could have provided sufficient corroboration].) However, this Court need not resolve the issue in light of respondent's concession that the accomplice testimony was not sufficiently corroborated.

II. THIS COURT MAY NOT DECIDE RODRIGUEZ'S CLAIM; IN ANY EVENT, RODRIGUEZ'S CONSTITUTIONAL CHALLENGE TO HIS 50-YEARS-TO-LIFE SENTENCE IS MOOT, BUT RODRIGUEZ IS ENTITLED TO A LIMITED REMAND UNDER *FRANKLIN*

Appellants raise identical constitutional challenges to their 50-years-to-life sentences. In light of respondent's concession on the accomplice corroboration issue as to Barajas, respondent does not address this claim as

to him. Were Barajas's convictions to stand, this argument would apply equally to him.

Before the enactment of sections 3051 and 4801, Rodriguez was sentenced to 50 years to life. Following this Court's decision in *Franklin*, *supra*, 63 Cal.4th 261, the Fifth District Court of Appeal held that Rodriguez's constitutional challenge was moot. The Fifth District did not, however, remand the case to permit the trial court to determine whether appellants had been afforded a sufficient opportunity at sentencing to make a record of mitigating evidence that may be relevant at a future youth offender parole hearing, as this Court did in *Franklin*. Rodriguez now contends that his constitutional challenge was not moot because he was not granted a remand. (ROBM 21-62.)

This Court may not decide the issue as to Rodriguez because Rodriguez did not file a petition for review and the court did not grant review as to him on its own motion. In any event, sections 3051 and 4801 render Rodriguez's constitutional challenge moot, regardless whether the case is remanded. The remand in *Franklin* was statutorily, not constitutionally, driven. However, because Rodriguez was sentenced before sections 3051 and 4801 were enacted and before this Court's decision in *Franklin*, respondent concedes that, under *Franklin*, Rodriguez is entitled to a limited remand.

A. This Court May Not Address Rodriguez's Claim Because He Did Not File a Petition for Review

As a threshold matter, this Court may not address Rodriguez's claim because Rodriguez did not file a petition for review. Barajas's petition for review, which the court granted (Cal. Rules of Court, rule 8.512(b)(1)), was not filed on behalf of Rodriguez. Nor did this Court order review as to Rodriguez on its own motion within 30 days after the decision was final in

the Court of Appeal.[8] (Cal. Rules of Court, rule 8.512(c)(1).) Without a timely filed petition for review by Rodriguez or a grant of review on the court's own motion as to him, it appears that the court does not have jurisdiction to decide his claim. (Cf. *Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1025 ["Accordingly, the petition for review was timely filed and we have jurisdiction in this matter."].) Because the court appointed counsel for Rodriguez and permitted him to file an opening brief on the merits, respondent will address the issues raised in Rodriguez's Opening Brief on the Merits.

B. Penal Code Sections 3051 and 4801 Render Rodriguez's Constitutional Challenge Moot Because They Provide Rodriguez with a Meaningful Opportunity for Release after No More than 25 Years of Imprisonment

The Supreme Court in *Graham v. Florida, supra,* 560 U.S. 48 categorically barred under the Eighth Amendment a court's imposition of an LWOP sentence on a juvenile offender convicted of nonhomicide offenses. The court explained that juveniles, by reason of their immaturity, are less culpable for their criminal actions than their adult counterparts. (*Id.* at p. 68.) Given the transient nature of juveniles' immaturity, the court expressed concern about the difficulty of identifying the "irreparable corruption" typically needed to justify an LWOP sentence. (*Ibid.*) The high court also 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." (*Id.* at p. 69.) In light of those considerations, the court determined that sentencing juveniles to the

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[8] The deadline to grant review on the court's own motion or order an extension in absence of a petition for review was February 18, 2017. Here, the court extended time to grant or deny review on March 23, 2017, and granted Barajas's petition for review on April 12, 2017.

"'second most severe penalty permitted by law'" could not be justified by legitimate penological goals in nonhomicide cases. (*Id.* at p. 69, quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (conc. opn. of Kennedy, J.).)

Graham itself made clear the limits of the court's holding, namely, that a "[s]tate need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." (*Graham, supra*, 560 U.S. at p. 82.) Stated in other words, states must give the offender "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id.* at p. 75.) The high court directed that "[i]t is for the [s]tate, in the first instance, to explore the means and mechanisms for compliance" with this requirement. (*Ibid.*) The court did not say the required "means and mechanisms" are limited to judicial sentencing.

Two years later, in *Miller, supra*, 567 U.S. 460, the Supreme Court revisited LWOP sentences for juveniles, this time in the context of a conviction for murder. Initially, the high court clarified that *Graham*'s "flat ban" on LWOP sentences for juveniles applies only to nonhomicide cases. (*Id.* at p. 473.) Recognizing, however, the force of *Graham*'s insistence that "youth matters" when considering whether a juvenile should be denied any opportunity for release (apart from clemency) from the outset of his sentence, *Miller* held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." (*Id.* at p. 479.) The court explained that mandatory LWOP poses a great risk of disproportionality by making all age-related considerations irrelevant to the imposition of these stringent and irrevocable sentences. (*Ibid.*) While the court expressly refused to invalidate LWOP sentences for juveniles, *Miller* demanded that sentencing

courts considering LWOP sentences "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id.* at pp. 479-480.)

Shortly after *Miller*, this Court in *Caballero*, *supra*, 55 Cal.4th 262 considered a mandatory term-of-years sentence not constituting actual LWOP. *Caballero* struck down mandatory consecutive terms aggregating to a 110-years-to-life sentence for three nonhomicide offenses by a 16-year-old defendant on the ground that the 110-year term transgressed *Graham*'s "flat ban." (*Id.* at p. 268.) This Court reasoned that "[a]lthough the state is by no means required to guarantee eventual freedom to a juvenile convicted of a nonhomicide offense, *Graham* holds that the Eighth Amendment requires the state to afford the juvenile offender a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" and that "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." (*Id.* at p. 266, quoting *Graham*, *supra*, 560 U.S. at p. 73.) "'*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.'" (*Caballero*, *supra*, at p. 267, quoting *Miller*, *supra*, 567 U.S. at p. 473.) Pursuant to *Graham*, *Caballero* held that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*Caballero*, at p. 268.)

Caballero emphasized that its holding must be understood in the context of "*Graham*'s analysis, [which] *does not focus on the precise sentence meted out.* Instead, it holds that a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime." (*Caballero*, *supra*, 55 Cal.4th at p.

268, quoting *Graham*, *supra*, 560 U.S. at p. 82, italics added.) Echoing *Graham*'s invitation to the states to explore "means and mechanisms" of complying with its Eighth Amendment requirement, the court in *Caballero* resolved that legislative action could meet the state's requirement to provide a realistic opportunity for parole in such cases: "We urge 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." (*Caballero*, at p. 269, fn. 5.) Like the United States Supreme Court, this Court did not suggest in *Caballero* that only a judicial "mechanism" will do.[9] It would be strange if it had since parole eligibility determinations are traditionally administrative in nature.

The California Legislature heeded this Court's recommendation. On September 16, 2013, the Governor signed into law Senate Bill No. 260. The bill established a parole eligibility mechanism for juvenile offenders with life sentences in both nonhomicide and homicide cases. In so doing, the state responded directly to the expressions in *Miller*, *Graham*, and *Caballero* that the deprivation of a court's ability to consider the offender's youthfulness before imposing LWOP or functional equivalents risks significant sentence disparity that violates the Eighth Amendment.

Section 1 of Senate Bill No. 260 states, in pertinent part:

> The Legislature finds and declares that, as stated by the United States Supreme Court in *Miller v. Alabama* (2012) 183 L.Ed.2d 407, "only a relatively small proportion of adolescents" who engage in illegal activity "develop entrenched patterns of problem behavior," and that "developments in psychology and

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[9] The United States Supreme Court confirmed in *Montgomery v. Louisiana* (2016) 136 S.Ct. 718, 736, that a state "may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."

> brain science continue to show fundamental differences between juvenile and adult minds," including "parts of the brain involved in behavior control." The Legislature recognizes that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262 and the decisions of the United States Supreme Court in *Graham v. Florida* (2010) 460 U.S. 48, and *Miller v. Alabama* (2012) 183 L.Ed.2d 407.

(Stats. 2013, ch. 312, § 1.)

Effective January 1, 2014, Senate Bill No. 260 added new section 3051. That section establishes parole eligibility dates for juvenile offenders based on the length of the sentence imposed for the "controlling offense," defined as "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." (§ 3051, subd. (a)(2)(B).) As relevant to this case, the section provided:

> A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.

(§ 3051, subd. (b)(3), as amended by Stats. 2013, ch. 312, § 4.[10]) Section 3051, subdivision (e), further provides that the youth offender parole hearing "shall provide for a meaningful opportunity to obtain release." Additionally, section 3051, subdivision (f)(1), declares that any

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[10] That statute now applies to persons who committed a controlling offense before age 23. (Stats. 2015, ch. 471, § 1.)

psychological evaluations and risk assessments, if used by BPH, "shall 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." Subdivision (f)(2) permits family members, friends, and others with knowledge about the offender before the crime or the offender's growth and maturity since the time of the crime to submit statements to BPH for review.

Senate Bill No. 260 also amended section 3046 to exempt juvenile offenders from the rule that prisoners sentenced to consecutive life sentences must serve their full consecutive terms before becoming eligible for parole. (§ 3046, subds. (a)-(c), as amended by Stats. 2013, ch. 312, § 3.) Accordingly, juvenile offenders such as Rodriguez are eligible for parole determinations under the provisions of Senate Bill No. 260 regardless of any consecutive terms of years.

Finally, Senate Bill No. 260 amended section 4801 to require BPH to consider the youth-related factors articulated in *Miller* and *Caballero* when reviewing a juvenile offender's suitability for parole at a youth offender parole hearing. Under the amended statute, BPH "shall give great weight to the diminished capacity 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." (§ 4801, subd. (c), as amended by Stats. 2013, ch. 312, § 5.)

In *Franklin*, which involved a constitutional challenge to a juvenile's sentence of 50 years to life, just as this case does, the court held that the protections outlined in *Miller* apply equally to juveniles sentenced to the functional equivalent of LWOP for a homicide offense. (*Franklin*, *supra*, 63 Cal.4th at p. 276.) However, *Franklin* also held that the statutory changes enacted by Senate Bill No. 260 bring California juvenile sentencing into conformity with *Miller, Graham,* and *Caballero* and moot a

constitutional claim raised under those cases. (*Id.* at pp. 268, 276-280.) The new statutory scheme superseded the juvenile offender's statutorily mandated sentence of 50 years to life by operation of law and ensured that the offender would have a meaningful opportunity for release on parole no more than 25 years into their incarceration. (*Id.* at pp. 277-279.)

"A claim is moot when the grounds for the claim no longer exist." (*People v. Peoples* (2016) 62 Cal.4th 718, 773.) "[S]ection 3051 [and the related statutes have] abolished de facto life sentences." (*People v. Scott* (2016) 3 Cal.App.5th 1265, 1281.) Because Rodriguez is no longer serving an LWOP sentence or its functional equivalent, he does not have a cognizable constitutional claim under *Miller*. (*Franklin*, *supra*, 63 Cal.4th at p. 280.) Therefore, the constitutional claim is moot. (*Ibid.*)

C. The Validity of the Constitutional Claim is Not Dependent on an Offender's Ability to Present Relevant Mitigating Evidence at Some Point Prior to the Youth Offender Parole Hearing

Contrary to Rodriguez's contention (ROBM 21-62), the validity of his constitutional claim is not affected by the Court of Appeal's failure to remand the matter like this Court did in *Franklin*. In other words, Rodriguez's constitutional claim is moot regardless whether a limited *Franklin* remand is granted. Whether the current statutory scheme has reduced sentences and granted parole hearings to comply with constitutional requirements and whether each offender should be granted an opportunity to present relevant mitigating evidence at some point prior to an eventual youth offender parole hearing are separate and distinct questions.

In *Franklin*, the court repeatedly declared, without qualification, that the constitutional claim was moot. (*Franklin*, *supra*, 63 Cal.4th at p. 268 ["sections 3051 and 4801—recently enacted by the Legislature to bring juvenile sentencing in conformity with *Miller*, *Graham*, and *Caballero*—

moot Franklin's constitutional claim."]; *id.* at pp. 276-277 ["Senate Bill No. 260 has mooted Franklin's claim under *Miller*."]; *id.* at p. 280 ["Because Franklin is not serving an LWOP sentence or its functional equivalent, no *Miller* claim arises here. The Legislature's enactment of Senate Bill No. 260 has rendered moot Franklin's challenge to his original sentence under *Miller*."]; *id.* at p. 286 ["We thus conclude that Franklin's Eighth Amendment challenge to his original sentence has been rendered moot."].) The claim was declared moot because Franklin's sentence, by operation of law, was no longer the functional equivalent of LWOP, and the record did not include evidence that the Legislature's mandate that youth offender parole hearings must provide for a meaningful opportunity to obtain release is unachievable in practice. (*Id.* at p. 286.)

The same is true here. As a result of sections 3051 and 4801, Rodriguez is effectively serving a sentence of 25 years to life. His sentence, which is constitutional under *Graham*, *Miller*, and *Caballero* (*Franklin*, *supra*, 63 Cal.4th at pp. 279-280), remains the same with or without a remand.[11] And, as in *Franklin*, there is no evidence in the record that the Legislature's mandate that youth offender parole hearings must provide for a meaningful opportunity to obtain release is unachievable in practice without a remand.

The *Graham* idea of a "meaningful opportunity" (*Graham, supra,* 560 U.S. at p. 75) or "realistic opportunity" (*id.* at p. 82) to obtain release stood in contrast to the Florida sentence and statutory scheme at issue that denied the offender "any chance" to demonstrate rehabilitation (*id.* at p. 79) and "guarantee[d]" that he would die in prison (*ibid.*). California's statutory scheme meets *Graham*'s concerns by providing juvenile offenders a

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[11] The issue of whether a sentence of 50 years to life is the functional equivalent of LWOP for juvenile offenders is currently before this Court in *People v. Contreras*, S224564.

meaningful chance to demonstrate rehabilitation after a maximum of 25 years of imprisonment. Section 3051, subdivision (e), declares that a youth offender parole hearing "shall provide for a meaningful opportunity to obtain release." In furtherance of that guarantee, sections 3051, subdivision (f), and 4801, subdivision (c), require BPH to "give great weight" to factors relating to the offender's youth, maturity, and rehabilitation and provide for the presentation and consideration of such evidence at the hearing. Any psychological evaluations and risk assessments must consider factors relating to the offender's youth, maturity, and rehabilitation. (§ 3051, subd. (f)(1).) Family members, friends, school personnel, faith leaders, and representatives from community-based organizations may submit statements with information relating to those factors as well. (§ 3051, subd. (f)(2).) Additionally, an offender may present relevant documentary evidence, including mitigating evidence relevant to his youth, maturity, and rehabilitation, to BPH. (Cal. Code Regs., tit. 15, § 2249.)

In light of these provisions, it is difficult to conceive how the statutory scheme does not provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" (*Graham*, *supra*, 560 U.S. at p. 75) or how Rodriguez could affirmatively establish that point based on the record on appeal. BPH's consideration is certainly not limited to the evidence in the record at sentencing or on a remand. (See ROBM 57-58.) The scheme does not "preclude[] consideration" of youth-related factors (see *Miller*, *supra*, 567 U.S. at p. 467); to the contrary, it mandates that BPH consider them and give them "great weight," with or without a remand. The opportunity to obtain release that is offered to juvenile offenders is not "bare" (RBOM 22); in fact, it extends beyond that which is granted to adult offenders. (See §§ 3041, 3051, subd. (d), 4801, subd. (c).) A remand in this case to potentially allow Rodriguez an opportunity to present relevant mitigating evidence at some point prior to the youth

offender parole hearing is not required to comply with the constitutional requirements articulated in *Graham*, *Miller*, and *Caballero*. A ruling to the contrary would be based on pure speculation. As was the case in *Franklin*, *supra*, 63 Cal.4th at page 286, it would be premature to declare that the current statutory scheme does not provide a meaningful opportunity to obtain release absent a remand.

The United States Constitution does not mandate that a juvenile offender have an opportunity to establish some evidentiary baseline at or near the time of the crime or sentencing concerning his or her youth, maturity, and prospects for rehabilitation in order to provide the offender a meaningful opportunity to obtain release at a future parole hearing. To the contrary, the United States Supreme Court appears to have contemplated parole hearings at which evidence relating to an offender's youth, maturity, and rehabilitation would be introduced for the first time. *Montgomery v. Louisiana* (2016) 136 S.Ct. 718, 736 approved the remedy of permitting juvenile homicide offenders to be considered for parole rather than resentencing them, citing the Wyoming statutory scheme that does not appear to provide for the possibility of establishing a baseline at any time prior to the parole hearing. (See Wyo. Stat. Ann. §§ 6-10-301(c), 7-13-402.) Acknowledging the petitioner's claims that he had evolved from a "troubled, misguided youth to a model member of the prison community," the high court explained that such submissions were an example of one kind of evidence that prisoners might use to demonstrate rehabilitation. (*Montgomery*, 136 S.Ct. at p. 736.) Such evidence can be presented at a parole hearing. *Montgomery* does not appear to require or contemplate any sort of "baseline hearing" prior to the parole hearing.

While acknowledging "colorable concerns" regarding Franklin's opportunity to make a record of youth-related mitigating evidence at sentencing (*Franklin*, *supra*, 63 Cal.4th at pp. 268-269, 282-284), *Franklin*

did not hold that an opportunity to establish an evidentiary baseline for youth-related factors at some point prior to the parole hearing was necessary to satisfy the federal Constitution. Notably, *Franklin* never qualified that the constitutional claim was moot *only* if it was determined the offender had a sufficient opportunity to establish such a baseline. Nor did the court assert that the constitutional claim was not moot *unless* the case was remanded for that purpose.

As the high court suggests, it is possible, and adequate, for an offender to present evidence at a parole hearing that demonstrates the impact of his youth and immaturity as a juvenile as well as his subsequent growth and maturity since that time. The plain language of sections 3051 and 4801 and the relevant BPH regulations provide for this type of constitutionally sufficient parole hearing. The relevant question at a parole hearing is whether the offender has reached a point of sufficient growth, maturity, and rehabilitation such that he or she is presently "fit to rejoin society" (*Graham*, *supra*, 560 U.S. at p. 79), not necessarily how far the offender has come to reach that point. A "baseline hearing," although relevant, is not necessary to provide a meaningful opportunity for the offender to demonstrate at a parole hearing that he or she is fit to rejoin society.

The remand in *Franklin* was statutorily, not constitutionally, driven. It stemmed from the notion that the relevant statutes appeared to "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.) As Justice Werdegar observed in her concurring and dissenting opinion, "the majority does not claim a remand for what might be termed a 'baseline hearing' is constitutionally mandated by *Miller*." (*Id.* at p. 287.) Rather, the premise for the remand

was statutory, notwithstanding the lack of any express statutory provision requiring such a remand. (*Id.* at pp. 287, 289.) A *Franklin* remand is not required to ensure compliance with *Graham*, *Miller*, and *Caballero*.

The remand was additionally premised on the assumption that assembling such information "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.) Of course, a determination that assembling the relevant information is "more easily done" by remand is quite different from a determination that such a remand is constitutionally required, i.e., that a meaningful opportunity to obtain release cannot be had without one. (See *id.* at p. 290 (conc. & dis. opn. of Werdegar, J.) ["this court is not authorized to create and require such procedures simply because they might be a good idea"].) To the extent the Legislature contemplated a "baseline hearing" when it enacted the current statutory scheme, it provided for a procedural benefit in excess of what was constitutionally required. Contrary to Rodriguez's claim, a *Franklin* remand is not required to guarantee him a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham*, *supra*, 560 U.S. at p. 75.)

Regardless whether an evidentiary baseline has been set, BPH is still required to consider the relevant youth-related factors prior to making its parole decision. Whether a record of relevant information has already been made or whether relevant information is presented to BPH for the first time at the parole hearing, BPH can "give great weight to the diminished capacity of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity" of the offender in either instance. (§ 4801, subd. (c).) A youth offender parole hearing—at which

an offender has an opportunity to present evidence relating to the offender's youth, maturity, and rehabilitation and have that evidence considered by BPH, as the statutes afford—sufficiently provides a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation under *Graham*, *Miller*, and *Caballero*.

Decisions from other states that have enacted legislation comparable to California's have similarly concluded the change in sentence and opportunity for parole resolves the constitutional claim without consideration of youth-related factors prior to an eventual parole hearing. (See, e.g., *State v. Delgado* (Conn. 2016) 151 A.3d 345, 351-355 [following the enactment of Conn. Gen. Stat. § 54-125a, the offender's sentence, which included the opportunity for parole, no longer fell within the purview of *Miller* and judicial consideration of youth-related factors was not required]; *State v. Tran* (Haw.Ct.App. 2016) 378 P.3d 1014 [the enactment of HRS § 706-656(1), which does not require a court to consider mitigating factors of youth prior to an eventual parole hearing, resolved the offender's constitutional claim]; *State v. Mares* (Wyo. 2014) 335 P.3d 487, 495-499, 508 [amendments to Wyo. Stat. Ann. §§ 6-10-301(c), 7-13-402, which converted the offender's sentence by operation of law to include the opportunity for parole, mooted the offender's constitutional claim under *Miller* without further judicial intervention]; *State v. Vera* (Ariz.Ct.App. 2014) 334 P.3d 754, 759, 761 [the enactment of A.R.S. § 13-716, which provided a juvenile sentenced to a 25-years-to-life term with some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, adequately remedied the juvenile's *Miller* claim]; see *Diatchenko v. District Attorney* (Mass. 2013) 1 N.E.3d 270, 285-287 [the parole board's evaluation of the circumstances surrounding the commission of the crime, including youth-related factors, at an eventual parole hearing afforded the offender a meaningful opportunity to be considered for parole

suitability]; see also La. R.S. § 15:574.4(E) & La. C.Cr.P. Art. 878.1 [providing for parole eligibility without requiring a judicial determination or consideration of youth-related factors prior to the eventual parole hearing].) These decisions support the conclusion that Rodriguez's constitutional claim is moot regardless whether he is provided an opportunity to present relevant mitigating evidence at some point prior to a parole hearing.

Tying the validity of a California juvenile offender's constitutional claim under *Graham*, *Miller*, and *Caballero* to an opportunity to present relevant mitigating evidence at some point prior to the youth offender parole hearing, as appellant urges, would also raise practical concerns. The goal of a remand under *Franklin* is to ensure that the parties are provided a sufficient opportunity, if one was not previously available, under state statutes to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense before records are lost or destroyed and relevant witnesses become unavailable or are unable to sufficiently recall relevant information. (*Franklin*, *supra*, 63 Cal.4th at pp. 283-284.) As *Franklin* tacitly acknowledged, however, the effectiveness of each remand will depend greatly on the individual circumstances of each case and, particularly, the amount of time that has passed since the crime. A remand that occurs more than 13 years after the crime was committed, which would necessarily be the case for Rodriguez, is less likely to generate relevant and accurate information than a remand for an offender whose crime was committed just one or two years earlier.[12] It would be odd to condition mootness of constitutional claims on the varying and

[12] This assumes the trial court in each case determines the offender did not have a sufficient opportunity to present such evidence at sentencing.

unknown effectiveness of a remand procedure designed to satisfy statutory goals.

The problem of conditioning mootness on such a remand procedure is even more apparent when considering cases in which the goal of a remand cannot possibly be achieved. In a case where the juvenile offender has already become eligible for a youth offender parole hearing under sections 3051 and 4801 at the time of decision on appeal, the need for a *Franklin* remand would no longer exist. Under appellant's rule, however, either (1) the court would be required to order a useless and redundant remand in order to find the constitutional claim moot, or (2) the offender would prevail on his constitutional claim and be entitled to resentencing (which the high court has declared is not required, and which may or may not eliminate the need for a youth offender parole hearing) because he was not sufficiently able to establish an evidentiary baseline prior to the youth offender parole hearing. Neither result is appropriate or efficient to achieve statutory goals. Based on the varying circumstances that accompany these cases, appellant's rule would be difficult to implement equitably and efficiently.

A bright-line rule divorcing the mootness question from *Franklin*'s statutorily-driven remand requirement, on the other hand, would be easy to implement and would avoid difficult questions. Under respondent's proposed rule, a juvenile offender's constitutional claim under *Graham*, *Miller*, and *Caballero* is moot if the offender will be eligible for a youth offender parole hearing under sections 3051 and 4801. For the reasons explained above, these sections resolve the offender's constitutional claim.

D. Under *Franklin*, Rodriguez is Entitled to a Limited Remand

Even though Rodriguez's constitutional claim is mooted by the enactment of sections 3051 and 4801, he is nevertheless entitled to a

limited remand under state law as articulated by this Court in *Franklin*, assuming this Court finds jurisdiction over his appeal. Just like in *Franklin*, the fact that the constitutional claim is moot does not preclude a hearing at which Rodriguez has a sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at his youth offender parole hearing, which this Court has interpreted is required to fully implement the directive contained in those sections. The record is not clear whether Rodriguez had a sufficient opportunity to make such a record, so a remand is appropriate here under state law.

The probation department issued its report and recommendations in Rodriguez's case before the *Miller* and *Caballero* decisions. (2CT 528-548.) It is unknown whether Rodriguez's attorney, who declined to have Rodriguez interviewed for the report (2CT 542), would have advised him differently had he known that evidence related to Rodriguez's youth and maturity was potentially relevant to the sentencing determination or an eventual youth offender parole hearing. The sentencing court stated it had read the probation report but did not solicit any defense statements regarding youth-related factors or otherwise expressly consider any such factors or evidence prior to imposing sentence. (5RT 1249-1251.) Although the sentencing took place after *Miller* and *Caballero* were decided, it took place prior to the enactment of section 3051 and this Court's decision in *Franklin*. It is unclear whether Rodriguez understood both the need and the opportunity to develop the type of record contemplated by *Franklin* at the time of sentencing. Thus, this Court should remand the matter so that the trial court can determine whether Rodriguez had sufficient opportunity to put on the record information that will be relevant at a subsequent youth offender parole hearing and, if not, to

permit him to make that record. (*Franklin*, *supra*, 63 Cal.4th at pp. 284, 286-287.)[13]

CONCLUSION

The judgment against Barajas should be reversed and Rodriguez's appeal should be dismissed. Should this Court reach the merits of Rodriguez's claim, however, the matter should be remanded for the limited purpose of determining whether he was afforded an adequate opportunity to make a record of information that will be relevant to his eventual youth offender parole hearing and, if the trial court determines he did not have sufficient opportunity, permitting him to present relevant evidence and, if appropriate, testimony. (*People v. Franklin*, *supra*, 63 Cal.4th at pp. 284, 286-287.) In all other respects, Rodriguez's judgment should be affirmed.

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[13] In light of respondent's concession that appellant is entitled to a *Franklin* remand, respondent does not address Rodriguez's contention that the failure to grant a remand would result in a violation of procedural due process. (ROBM 58-62.)

Dated: October 12, 2017

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 9,620 words.

Dated: October 12, 2017

XAVIER BECERRA
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rodriguez, et al.** No.: **S239713**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 13, 2017, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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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 October 13, 2017, at Sacramento, California.

L. Lozano
Declarant

Signature

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