IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

In his Opening Brief on the Merits (hereinafter "RBOM"), appellant Jesus Manuel Rodriguez explained the first question this Court established as one of two issues to be briefed and argued -- whether accomplice testimony in this case was sufficiently corroborated -- was moot as to him, and applied only to his codefendant and co-appellant, Edgar Barajas. (RBOM, at pp. 19-20.)

As to the second issue to be briefed and argued -- whether the court of appeal's failure to remand appellant's case in accordance with People v. Franklin (2016) 63 Cal.4th 261 (hereinafter "Franklin"), means his constitutional challenge to his sentence of 50 years to life is still viable -- Rodriguez established that, in the absence of such a remand, he continues to suffer Eighth and Fourteenth Amendment violations. (RBOM, at pp. 21-62.)

In its Answer Brief on the Merits (hereinafter "ABOM"), the respondent State of California did something fairly unprecedented: it conceded the relief sought by both defendants. Specifically,

- In its response to the first issue, the respondent admitted it was "constrained to agree" accomplice testimony against Barajas was not sufficiently corroborated per Penal Code section 1111.[1] (ABOM, at p. 16.) As a result, it concluded the judgment against Barajas should be dismissed.[2] (ABOM, at p. 39.)

- In its response to the second issue, the respondent *conditionally* agreed Rodriguez is entitled to a remand "under state law as articulated in *Franklin*" (ABOM, at pp. 8, 22), "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." (ABOM at p. 39, citing Franklin, 63 Cal.4th at pp. 284, 286-287.[3])

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[1] The respondent noted Rodriguez "properly admits that this issue on review does not apply to him." (ABOM at p. 16, fn. 6)

[2] Although the respondent took issue with two points Barajas made, it stated "this Court need not resolve that issue in light of respondent's concession that the accomplice testimony was not sufficiently corroborated." (ABOM, at p. 21.)

[3] With respect to Barajas, the respondent noted that as it already conceded accomplice testimony was not sufficiently corroborated there was no need for a Franklin remand (ABOM, at pp. 8 and fn. 2, and 21-22), but "[w]ere Barajas's convictions to stand, this argument would apply equally to him." (ABOM, at p. 22.)

The condition to be overcome before Rodriguez can be remanded, however, is a determination of this Court's jurisdiction to hear his appeal. (ABOM, at p. 8 ["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"; *see also*, pp. 22-23 [same].) The respondent therefore argued, "Rodriguez's appeal should be dismissed." [4] (ABOM, at p. 39.)

And whether Rodriguez's case is remanded or not, the respondent also maintained the current statutory scheme moots any constitutional concerns (ABOM, at pp. 37-38, 39), as a Franklin-style remand is "statutorily driven, not constitutionally driven." (ABOM, at pp. 8, 22.)

In this brief Rodriguez therefore will first explain how this Court *does* have jurisdiction over the entire case, and that it is free to reach the Franklin issue as to him even in the absence of a timely review petition by him. He will then discuss how his claim remains a constitutional one.

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[4] The respondent conceded, however, that should this Court reach the merits of Rodriguez's claim, the matter should be remanded for the limited purpose of a Franklin-style hearing. (ABOM, at p. 39.)

ARGUMENT

I.

THIS COURT HAS JURISDICTION TO HEAR RODRIGUEZ'S APPEAL, BUT IF IT CONCLUDES IT DOES NOT, IT SHOULD CONVERT THIS APPEAL TO A HABEAS PETITION

Although the respondent agreed Rodriguez would otherwise be entitled to a Franklin-style remand, it argued "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." (ABOM, at pp. 8, 22-23; *see also*, p. 22 ["This Court may not decide the issue as to Rodriguez ..."], and p. 23 ["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"].) Therefore, the respondent argued that "Rodriguez's appeal should be dismissed." (ABOM, at p. 39.)

As explained below, the respondent is incorrect.[5] However, if this Court concludes it lacks jurisdiction, then (as also explained below), it should exercise its power to convert this matter to a habeas petition, and grant Rodriguez the requested remand relief.

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[5] To remind this Court of the procedural history, this case is before this Court on a second grant of review.

When the original opinion issued Rodriguez and Barajas both filed petitions for review, which were granted on a grant and hold basis. This case then was sent back for the court of appeal to reconsider its decision.

After an amended opinion issued, Rodriguez did not file a second petition for review. Barajas did, but Rodriguez did not join Barajas's second petition, which was granted on the merits.

This Court seemingly extended review to Rodriguez as well, however, as it appointed appellate counsel for him.

A. This Court Has Jurisdiction Over Rodriguez's Case

There is no dispute that Rodriguez did not file his own, second petition for review, following the amended opinion in this case. A party does not have to petition for review, however; California Rules of Court, Rule 8.512(c)(1), extends to this Court the power to order review on its own motion.[6]

The respondent acknowledged this Court granted Barajas's petition for review in a timely fashion, but argued this Court did not order review *as to Rodriguez* on its own motion within 30 days after the decision was final in the court of appeal, per Rule 8.512(c)(1). (ABOM, at pp. 22-23.) Accordingly, the respondent assumed this Court does not have jurisdiction over Rodriguez, because he failed to file a petition for review and this Court did not order review as to him on its own motion. (ABOM, at p. 23.)

The respondent is wrong.

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[6] The relevant Rule states:

"(c) Review on the court's own motion.

"(1) If no petition for review is filed, the Supreme Court may, on its own motion, order review of a Court of Appeal decision within 30 days after the decision is final in that court. Before the 30-day period or any extension expires, the Supreme Court may order one or more extensions to a date not later than 90 days after the decision is final in the Court of Appeal. If any such period ends on a day on which the clerk's office is closed, the court may order review on its own motion on the next day the clerk's office is open.

"(2) If a petition for review is filed, the Supreme Court may deny the petition but order review on its own motion within the periods prescribed in (b)(1)." (Cal. R. Ct., Rule 8.512.)

Rule 8.512(b)(1), on which the respondent's argument is premised, provides that: "The court may order review within 60 days *after the last petition for review is filed.* Before the 60-day period or any extension expires, the court may order one or more extensions to a date not later than 90 days after the last petition is filed." (Emphasis added.)

Significantly, that Rule does not limit this Court's order granting review only to those defendants who filed petitions for review; other than the time limitations imposed, this Court's power to order review is unqualified and unlimited by the statute, as to the parties affected or the issues presented.

In this case Barajas's review petition was the only petition filed from the amended opinion, so it was the "last petition" filed for purposes of rule 8.512(b)(1). It was timely filed on January 26, 2017, so the deadline to grant review or extend the period to do so was March 27, 2017. On March 23, 2017, this Court extended the date by which it could grant review to April 26, 2017.

On April 12, 2017, this Court granted Barajas's petition, within the time period allowed by rule 8.512(b)(1) and its own timely order extending the time to grant or deny review. This Court thus timely exercised jurisdiction over the *entire* case.

This Court could have limited its consideration of the issues to only those that may benefit Barajas, since he is the only defendant who filed a review petition. However, since this Court *has* timely exercised jurisdiction over the case, it is free to extend review to any issue, justiciable as to *any* party, it thinks

is important, whether or not any other party sought review. (*See*, Cal. R. Ct., Rule 8.512(c) [Supreme Court can grant review on its own motion even if no party seeks review], and Cal. Const., art. VI, sec. 12(b) ["The Supreme Court may review the decision of a court of appeal in any cause"].)

The respondent has cited no authority for its proposition that this Court lacks jurisdiction to extend review of the issues on which it has granted review to a party who did not seek review, and Rodriguez is unaware of any such authority. Instead, Rodriguez *is* aware of authority that arguments raised on appeal may be deemed forfeited if not supported by authority. (*See*, People v. Stanley (1995) 10 Cal.4th 764, 793; Ewald v. Nationwide Storage, LLC (2017) 13 Cal.App.5th 947, 948; Troensegaard v. Silvercrest Industries, Inc. (1985) 175 Cal.App.3d 218, 228.)

Finally, the respondent seems to concede that, by appointing counsel for Rodriguez, this Court manifested its intent to extend the benefit of its grant of review to Rodriguez as well as Barajas.[7] (ABOM, at p. 23 ["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"].)

Thus this Court has jurisdiction over Rodriguez's case.

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[7] Rodriguez acknowledges it is fortunate for him (and his appellate counsel) that this Court granted review of the case on an issue that may benefit him, and appointed counsel to brief the issue for his benefit, particularly as the respondent conceded the merits of that issue as to him.

B. If This Court Finds It Does Not Have Jurisdiction Over Rodriguez's Case, It Should Exercise Its Power To Convert This Matter To a Habeas Petition Based On the Ineffective Assistance of Appellate Counsel, In Order To Grant the Requested Relief

The undersigned, as Rodriguez's appellate counsel, overlooked the need to file a review petition on his behalf following the court of appeal's second opinion. If this Court determines it does not have jurisdiction to hear Rodriguez's appeal, and that it must dismiss his case rather than grant him the relief sought (which the respondent concedes he otherwise is entitled to), then appellate counsel was constitutionally ineffective.

To prevail on a claim of ineffective assistance of counsel (hereinafter "IAC"), a defendant must show his counsel's conduct fell below the standard of reasonableness and that he was prejudiced by that conduct. (People v. Kraft (2000) 23 Cal.4th 978, 1068-1069; People v. Foster (2003) 111 Cal.App.4th 379, 383.) Both prongs are met in this case: appellate counsel failed to file a second petition for review where such a petition clearly was meritorious (as Barajas's second petition for review was granted), and Rodriguez will be prejudiced by appellate counsel's omission if his case is dismissed, as the respondent conceded he otherwise would be entitled to a Franklin-style remand.

As the respondent conceded Rodriguez is entitled to relief *if* this Court has jurisdiction, then if this Court dismisses this appeal for lack of jurisdiction, Rodriguez will simply file a habeas petition alleging appellate counsel's IAC while asking for

the same relief: the remand to the trial court the respondent already agreed he is entitled to. To conserve scarce judicial resources and promote judicial economy, this Court should simply exercise its power to convert this appeal to a habeas petition, in order to reach the merits of the Franklin issue as to Rodriguez. (*See*, People v. Ellis (1987) 195 Cal.App.3d 334.) This will avoid a subsequent habeas petition alleging appellate counsel's ineffective assistance. (In re Dennis H. (2001) 88 Cal.App.4th 94, 98 at fn. 1; People v. Torres (1995) 33 Cal.App.4th 37.)

C. Conclusion

Rodriguez notes again that this Court *does* have jurisdiction over his case, since it timely granted review of Barajas' petition, as a result of which it is free to reach the Franklin issue as to Rodriguez, even in the absence of a timely review petition by him.

II.

THE RESPONDENT IS INCORRECT IN BELIEVING ENACTMENT OF THE NEW STATUTORY SCHEME MOOTED CONSTITUTIONAL CHALLENGES TO EXCESSIVE (OR "LIFE"), TERMS IMPOSED ON JUVENILE OFFENDERS, OR THAT WAITING TO AMASS RELEVANT INFORMATION FOR THE BOARD OF PAROLE HEARINGS UNTIL THE TIME OF A FUTURE PAROLE HEARING PROVIDES JUVENILE OFFENDERS THE SAME *MEANINGFUL* OPPORTUNITY FOR EARLY PAROLE AS DOING SO CLOSER IN TIME TO THE OFFENSE

To recap, Rodriguez was 15 years old when he committed the May 26, 2004 offenses underlying this case, for which he was sentenced to mandatory terms amounting to 50 years to life. After he was sentenced, the high court decided Graham v. Florida (2010) 560 U.S. 48, 82 [130 S.Ct. 2011, 176 L.Ed.2d 825] (hereinafter "Graham"), Miller v. Alabama (2012) 567 U.S. 460, 474 [132 S.Ct. 2455, 183 L.Ed.2d 407] (hereinafter "Miller"), and Montgomery v. Louisiana (2016) 577 U.S. ___ [136 S.Ct. 718, 736, 193 L.Ed.2d 599] (hereinafter "Montgomery"). These cases retroactively establish Rodriguez's sentence violates the Eighth Amendment.

But the subsequent enactment of Penal Code section 3051 and the amendment of Penal Code section 4801 (hereinafter "section 3051" and "section 4801"), now mean Rodriguez will not have to wait 50 years for his first chance at parole, but instead will have a "youthful offender" parole hearing after he serves 25 years. This Court previously found those changes brought California's juvenile sentencing into conformity with Graham and People v. Caballero (2012) 55 Cal.4th 262 (hereinafter "Caballero"), mooting constitutional challenges under those cases. (People v. Franklin (2016) 63 Cal.4th 261, 280 (hereinafter "Franklin").

It is true that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." (Montgomery, *supra*, 136 S.Ct. at p. 736.) The change in California's statutory scheme did exactly that: it reduced from 50 years, to 25 years, the time Rodriguez must wait for his first parole hearing.[8]

However, in Franklin, this Court remanded the matter to the sentencing court, to enable the defendant to make a record (if necessary), of information ("Miller factors"), relevant to a future Board of Parole Hearings (hereinafter "BPH"), when he finally is eligible for his Youth Offender Parole hearing under the new statutory scheme. The second question presented by the instant grant of review asked whether the new statutory scheme mooted Rodriguez's constitutional challenge as a youthful offender to the life sentence imposed, even absent a Franklin-style remand.

In its opposition the respondent agreed remand of Rodriguez's case is required under state law, as articulated in Franklin, and that the same would be true of Barajas if his convictions are not reversed. (ABOM, at pp. 8, 22.) But with specific respect to the second question posed by the grant of review in this case, it contended that, regardless of whether Rodriguez's case is remanded,

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[8] With some exceptions not applicable here, the Board of Parole Hearings now is required to conduct youth offender parole hearings for qualifying offenders during their 15th, 20th, or 25th year of incarceration, depending on the sentence for their "controlling offense," without regard to how long their aggregate term of imprisonment is. (Pen. Code, § 3051, subds. (b), (h).)

- "his constitutional challenge is moot in light of the statutory scheme" (ABOM, at pp. 8, 22; *see also*, ABOM, at pp. 37-38 [same]), "because sections 3051 and 4801 provide him with a meaningful opportunity for release on parole after no more than 25 years of imprisonment." (ABOM, at pp. 8, 23 [same].) And,

- an adequate opportunity to make a record of information relevant to the Board of Parole Hearings exists, even without a remand, as such information can be provided at the time of the future parole hearing. (ABOM, at pp. 31-35.)

For the following reasons, the respondent is incorrect.

A. The New Statutory Scheme Does Not Moot Eighth Amendment "Cruel and Unusual Punishment" Challenges

The respondent's first contention -- that Rodriguez's Eighth Amendment challenge to his current sentence is moot because a later change in the statutory landscape now provides him with an opportunity for an earlier release on parole -- is simply wrong. That statutory scheme is not grounded in state law and is not the creation of any state public policy. Instead, it came into being only after this Court recognized that, with respect to youthful offenders, certain sentences were unconstitutionally cruel and unusual punishment violating Graham (Caballero, *supra*, 55 Cal.4th at p. 268), and called upon our Legislature "to enact legislation establishing a parole eligibility mechanism that provides a ... juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity." (Id., at p. 269, fn. 5.)

As a result, the Eighth Amendment is the beating heartbeat of the new statutory scheme. If the newly enacted process for early parole hearings is misapplied, or if it is merely smoke and mirrors meant to placate federal authorities without truly establishing a mechanism for the early release of deserving youthful offenders, then Eighth Amendment challenges to life (or excessive) sentences for youthful offenders is still very much at issue.

For we now know that, only by allowing juvenile offenders sentenced to life terms (or their equivalent) to be considered for parole do States ensure such offenders "will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." (Montgomery, *supra*, 136 S.Ct. at p. 736.) But just offering a parole opportunity is not enough; the United States Supreme Court made clear that, while a state's statutory scheme need not guarantee a youthful offender eventual release, if it imposes a life sentence it must provide him with some *meaningful* opportunity to obtain such release. (Graham, *supra*, 560 U.S. at 82 (emphasis added); *see also*, Caballero, *supra*, 55 Cal.4th at 268 [Graham requires a juvenile offender be given "some *realistic* opportunity" to obtain release]; (emphasis added).)

A fortiori, a State that offers youthful offenders a bare opportunity to obtain early parole, without ensuring that such opportunity is *meaningful* (or *realistic*), continues to force those offenders to serve sentences that violate the Eighth Amendment.

The United States Supreme Court (the final arbiter of the United States Constitution), still has not held that the Eighth

Amendment is satisfied by parole release programs such as that established by sections 3051 and 4801. (Virginia v. LeBlanc (2017) __ U.S. __ [137 S.Ct. 1726, 1728-1729, 198 L.Ed.2d 186].) This is significant, for contrary to the respondent's contention California's new statutory scheme does not provide Rodriguez the required *meaningful* opportunity for release.

In that regard the new scheme does not guarantee early release;[9] in accordance with Graham it is not required to do so. (Graham, *supra*, 560 U.S. at 75.) This makes sense; there cannot and should not be guarantees of early release for youthful offenders who refuse to use their time while incarcerated to better themselves, or who continue to commit crimes while in prison.

However, the new scheme establishes only that Rodriguez will have an early parole hearing after he serves 25 years (Pen. Code, § 3051, subd. (b)(3)), and that at that hearing the BPH must take certain Miller factors into account. (Pen. Code, §§ 3051, subds. (f(1)-(2) and 4801, subd. (c).) By itself, without more, this statutory scheme does not provide a *meaningful* opportunity for parole relief.

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[9] Section 3051, subdivision (d) states that, "[a]t the youth offender parole hearing the board *shall* release the individual on parole ...." (Emphasis added.)

At first blush this appears to be a guarantee that youthful offenders will be released. But the statute then qualifies that provision by adding that release will be "as provided in Section 3041," and that the board must act in accordance with section 4801, subdivision (c). (Pen. Code, § 3051, subd. (d).

Section 3041 does not guarantee a youthful offender release, as parole can be denied. (Pen. Code, § 3041, subd. (a)(3).) And all section 4801, subdivision (c) does is direct the BPH to consider Miller factors.

Because for those youthful offenders who do mature for the better while in prison, the statutory scheme fails to establish a uniform mechanism for them to present the very best record of their rehabilitation, to ensure they are paroled at the earliest possible opportunity. As such the new statutory scheme does not, by itself, moot Rodriguez's Eighth Amendment challenge.

B. The New Statutory Scheme Creates Rather Than Moots A Fourteenth Amendment Due Process Violation

Rodriguez's Opening Brief on the Merits noted that he also suffered a Fourteenth Amendment due process violation, insofar as he was sentenced before he knew he should make a record at his sentencing hearing of information that will be relevant to a future BPH. (RBOM, at pp. 58-62.)

In light of its concession that Rodriguez is entitled to a Franklin-style remand, the respondent expressly chose not to address this contention. (ABOM, at p. 39, fn. 13.) But this "notice" issue is critical, for two reasons.

The first is that as of the time this Reply Brief is being filed, it already has been more than 13-1/2 years since Rodriguez's 2004 offenses, yet due to the ongoing denial of his due process rights to notice and opportunity he still has not been able to make any record of information that will be relevant to the BPH as it fulfills its statutory obligations under Penal Code sections 3051 and 4801.

The second is in light of further legislative developments.

For as originally enacted in 2013, only persons under 18 years of age at the time of their controlling offense were entitled to a section 3051 youth offender parole hearing. (Stats. 2013, ch. 312, § 4, pp. 2524-2525.) Rodriguez was included in this initial group. But as of January 1, 2016, persons under 23 years of age at the time of their controlling offense also are entitled to a youth offender parole hearing. (Stats. 2015, ch. 471, § 1, pp. 4174-4176.) And now -- based on Governor Brown signing Assembly Bill 1308 into law on October 11, 2017 -- effective January 1, 2018, persons under 25 years of age at the time of their controlling offense also are entitled to a youth offender parole hearing. (Stats. 2017, ch. 675.)

Thus in California there is an ever-growing pool of candidates for early release under the new Youth Offender Parole program, who had no notice that they should make a record of information that will be relevant to their future BPH, and no opportunity to do so. As a result, all are suffering Fourteenth Amendment due process violations.

It is true that the new statutory scheme states that,

> "[T]o ... provide for a meaningful opportunity to obtain release ... [t]he board shall review and, as necessary, revise existing regulations and adopt new regulations ... consistent with relevant case law, in order to provide that meaningful opportunity for release." (Pen. Code, § 3051, subd. (c).)

However, this is not a solution to the problem. The remand this Court ordered in Franklin directed the sentencing court to determine whether the defendant there was provided a sufficient

opportunity to make an accurate record of his juvenile offender characteristics and circumstances at the time of the offense, and if not, to conduct a hearing at which he could make such a record. (Franklin, *supra*, 63 Cal.4th at 283-284.) The BPH has no power or authority to revise existing regulations, or adopt new ones, that compel a trial court to do anything.

As a result, rather than mooting constitutional challenges, the new statutory scheme creates a Fourteenth Amendment challenge.

C. A Blanket Requirement Of "Baseline" Hearings For Juvenile Offenders Likely Will Ameliorate Constitutional Concerns

The respondent noted this Court has not held a Franklin-style remand is required by the United States Constitution, and that Justice Werdegar's concurring and dissenting opinion in that case said, "the majority does not claim a remand for what might be termed a 'baseline hearing' is constitutionally mandated by *Miller*." (ABOM, at p. 33, quoting Franklin, *supra*, 63 Cal.4th at p. 287.) The respondent therefore argued that, as Franklin "never qualified that the constitutional claim was moot *only* if it was determined the offender had a sufficient opportunity to establish an evidentiary baseline of youth-related factors at some point prior to a parole hearing," the remand in Franklin was driven by the new statute, not by any constitutional right. (ABOM, at p. 33.)

And so the real question is whether a youthful offender's *meaningful* opportunity to obtain early parole is satisfied only if a "baseline" of Miller factors is made as close as possible to his

sentencing, so that a later Board can compare and contrast who he was, to what he now is, and thus make a reasoned determination of his rehabilitation.

The respondent contended it does not, and that a future youth offender hearing alone will provide an offender a sufficient opportunity to obtain release. (ABOM, at p. 35). It argued the scope of a BPH hearing will not be limited to what was evidenced for the record at sentencing (or on a remand). (ABOM, at pp. 31-32.) The BPH can give "great weight" to enumerated Miller factors whether the record of relevant information already was made, or is presented to the BPH for the first time at the parole hearing. (ABOM, at p. 34.) Therefore, "In light of the statutory scheme, remand is not necessary to ensure a meaningful opportunity for release ...." (ABOM, at p. 8), and the validity of a constitutional claim is not dependent on an offender's ability to present relevant mitigating evidence at any point prior to the Youth Offender Parole hearing. (ABOM, at p. 29.)

The respondent's reasoning fails to take into account a trial court's traditional role in developing the factual record for later review. (*See, e.g.* In re Moser (1993) 6 Cal.4th 342, 352-353 [remand of the matter to the superior court ordered, for a hearing and determination of a prejudice question].) That traditional role explains why the high court stated that *sentencing* courts -- not parole boards -- should consider the differences between children and adults, and how those differences counsel against irrevocably sentencing children to a lifetime in prison. (Miller, *supra*, 567

U.S. at pp. 477, 480.) This Court said essentially the same thing. (Caballero, *supra*, 55 Cal.4th at pp. 268-269 ["the state may not deprive [youthful offenders] *at sentencing* of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. Under *Graham*'s nonhomicide ruling, *the sentencing court* must consider all mitigating circumstances attendant in the juvenile's crime and life ...."]; emphasis added.)

These cases express a judicial recognition that a court rather than a future parole board is the proper place in the first instance to gather information critical to the eventual length of a youthful offender's sentence. For cases such as Rodriguez's, where that information was not amassed as part of the initial sentencing hearing, only a remand for a Franklin-style baseline hearing (if the trial court determines one is necessary), will suffice. Or as one court put it, "a statutory promise of future correction of a presently unconstitutional sentence does not alleviate the need to remand for resentencing that comports with the Eighth Amendment." (*See*, People v. Garrett (2014) 227 Cal.App.4th 675, 690-691.)

The Eighth Amendment does not permit a state to deny a defendant "any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed when he was a child in the eyes of the law." (Graham, *supra*, 560 U.S. at p. 79.) Bearing in mind that the new statutory scheme provides for BPH youthful offender hearings *no sooner than* 15, 20 or 25 years after sentencing, it only makes sense that baseline hearings should

be conducted as close in time to the actual offense as possible, rather than at the time of some far-in-the future BPH hearing, in order to satisfy the Eighth Amendment. One fact in the instant record fully illustrates this point.

At Rodriguez's 2004 fitness hearing, his former teacher testified. (*See*, Settled Statement Rough Draft #2, at p. 2.) She established for the record some important but maddeningly sketchy points about his character traits. (Court Exhibit A to Settled Statement, at p. 1 of Exhibit A.) But as no one at the time realized how important her perceptions would be to his then-unknown right to a future opportunity for early parole, there was no follow-up and, in fact, her testimony was not even preserved -- it exists only by virtue of a Settled Statement.

Rodriguez now asks this Court to consider what will be more valuable to both him and his future BPH: to preserve for the record *at this time* the testimony of a teacher who still has a recent-enough memory to speak knowledgeably about the non-violent child (s)he knew, or to wait at least 15 years and possibly as long as 25 years into the future, before trying to locate that same teacher who, if (s)he is still alive, will struggle to recall the name, much less the face or the personality, of one of hundreds of students who have since come and gone?

The statutory scheme is still so new that there is little anecdotal evidence, much less accurate evidence, of how much the BPH is struggling now to obtain Miller-factor information in conducting the new Youth Offender Parole hearings. The respondent's

suggestion would delay the gathering of that necessary information for 15, 20 and 25 years into the future, until such time as the hearings are held, rather than gathering the information now. But because these parole hearings are *all* that prevent life terms or excessive sentences imposed upon juvenile offenders from violating the United States Constitution, it is unrealistic to wait as much as a quarter-century to see whether the experiment of offering early release on parole is a success or a failure.

Instead, doing something closer in time to the offense, in order to secure the likelihood of an eventual early release on parole, is necessary.

In Franklin the defendant argued a "baseline" was the required "something" that could be done closer in time to the offense, for without one "'there would be no reliable way to measure his cognitive abilities, maturity, and other youth factors when the offense was committed 25 years prior.'" (Franklin, *supra*, 63 Cal.4th at p. 282.) This Court found that a "colorable concern[]" (id. at p. 269), and seemingly recognized at that time that it is necessary to "make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation ...." (Id, at p. 284.)

To effectuate the constitutional requirement that a juvenile offender's opportunity to obtain release is "meaningful," there simply must be an accurate record of the juvenile offender's characteristics and circumstances as early as possible.

D. That a Blanket Requirement Of "Baseline" Hearings For Juvenile Offenders May Be Difficult (Or Costly), To Implement, Is Not An Excuse To Avoid What May Be Required To Bring California's Juvenile Offender Sentencing Scheme Into Compliance With the Federal Constitution

The respondent argued that presenting relevant information to the PBH at the time a Youth Offender Parole hearing is conducted is the better plan, for "a contrary rule would be difficult to implement fairly and efficiently." (ABOM, at p. 8; *see also*, ABOM, at p. 37 ["appellant's rule would be difficult to implement equitably and efficiently"].)

This is a non-argument. Just because remands to sentencing courts for Franklin-style determinations may be difficult does not mean they should not be ordered. "'Mere inconvenience resulting from a construction according to the clear meaning of a statute will not justify the courts in ignoring its terms.'" (People v. Bell (2015) 241 Cal.App.4th 315, 352, quoting 58 Cal.Jur.3d Statutes, § 108.)

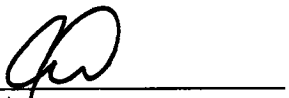
"(D)ue process is flexible and calls for such procedural protections as the particular situation demands." (Morrissey v. Brewer (1972) 408 U.S. 471, 481 [92 S.Ct. 2593, 33 L.Ed.2d 484].) "The primary purpose of procedural due process is to provide affected parties with the right to be heard at a meaningful time and in a meaningful manner. Consequently, due process is a flexible concept, as the characteristic of elasticity is required in order to tailor the process to the particular need." (People v. Hansel (1992) 1 Cal.4th 1211, 1219.)

Under the circumstances discussed in this appeal, the only way to ensure records for a future BPH are accurate is to remand, in accordance with Franklin, for trial court determinations that all relevant Miller factors have been preserved on the record for youthful offenders to use at their future BPH hearings.

CONCLUSION

Rodriguez respectfully requests this Court remand this matter to the trial court for a Franklin-style determination of information about him that will be relevant to a future Board of Parole Hearings in carrying out its analysis under sections 3051 and 4801, subdivision (c).

Respectfully submitted,



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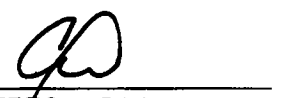
BRIEF LENGTH AND FORMAT CERTIFICATION

I, Cara DeVito, counsel for Jesus Manuel Rodriguez, certify that the word count for the foregoing Reply Brief On the Merits is 5,770 words, excluding tables; that this document was prepared in WordPerfect 12, font size 12; and that this is the word count generated by that program.

I certify under penalty of perjury under the laws of the State of California that foregoing is true and correct. Executed at Summerlin, Nevada on November 4, 2017.



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PROOF OF SERVICE BY MAIL

State of California)
) ss.
County of Los Angeles)

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

I declare that on November 4, 2017, I served the within Reply Brief on the Merits (appellant Jesus Manuel Rodriguez), on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Summerlin, Nevada, addressed as follows:

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

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Cara DeVito