IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent,	)	No. S224565
v.	)	Court of Appeal No. D063428
LEONEL CONTRERAS and WILLIAM STEVEN RODRIGUEZ, Defendants and Appellants.	)	

Fourth Appellate District, Division One
San Diego County Case No. SCD236438
The Honorable Peter C. Deddeh, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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By Appointment of the Supreme
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ISSUE PRESENTED FOR REVIEW

Is a total sentence of 50 years to life or 58 years to life the functional equivalent of life without the possibility of parole for juvenile offenders?

INTRODUCTION

Appellant Leonel Contreras was 16 years old when he and co-appellant, William Rodriguez, were convicted in a joint trial on multiple counts of sexual assault on two teenage girls. Appellant was sentenced to a term of 50 years to life plus 8 years. This court has asked the parties to brief the issue that was left unresolved in *People v. Franklin* (2016) 63 Cal.4th 261, which, specifically to Mr. Contreras, is whether a term of 58 years to life for a juvenile offender is the functional equivalent of a term of life without the possibility of parole.

The answer lies in the line of authority established by the United States Supreme Court in *Roper v. Simmons* (2005) 543 U.S. 551, *Graham v. Florida* (2009) 560 U.S. 48, and *Miller v. Alabama* (2012) 132 S. Ct. 2455, as well as this court's decisions in *People v. Caballero* (2012) 55 Cal.4th 262 and *People v. Gutierrez* (2014) 58 Cal.4th 1354. Together, these decisions stand for the proposition that the Eighth Amendment requires children to be treated differently from adults for sentencing purposes.

The cases acknowledge decades of medical and social science research that identify mitigating factors of youth, such as "transient rashness, proclivity for risk, and inability to assess consequences."

(*Miller*, 132 S.Ct. at p. 2464, quoting *Roper, supra*, 543 U.S. at p. 570.) Such factors of youth "both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." (*Miller*, 132 S.Ct. at p. 2464, quoting *Roper*, 543 U.S at p. 570.)

In the high court's cases, the decisions went from finding the Eighth Amendment barred the death penalty for homicides committed by juveniles (*Roper*), to the same finding regarding terms of life without the possibility of parole for non-homicide offenses (*Graham*). Finally, the court in *Miller* held that imposition of a mandatory term of life without parole for a homicide committed by a juvenile also violates the Eighth Amendment.

The United States Supreme Court cases involved juveniles who had been given either a sentence of death or terms of life without the possibility of parole. In *Caballero*, this court applied the rationale to a de facto term of life in a non-homicide offense, when it reversed a 16-year old's sentence of 110 years to life.

In the instant case, this court will consider what the United States Supreme Court means when it says that a juvenile offender must be given a term that provides "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham, supra*, 560 U.S. at p. 75.) Is the mere possibility of a parole hearing before death a "meaningful

opportunity?" Or did the high court contemplate providing the juvenile offender a meaningful opportunity for reentering society as a mature and rehabilitated adult, and the possibility of experiencing life outside the prison walls? As discussed below, only the second of those two options preserves the intent of the high court's rulings.

STATEMENT OF THE CASE

On November 2, 2012, appellant Leonel Contreras and co-appellant William Rodriguez were convicted by a jury in case number SCD236438 of the following felony offenses:

> Count 1 – Conspiracy to commit kidnapping (Pen. Code, § 207, subd. (a)) and/or forcible rape (Pen. Code, §261, subd. (a)(2)), in violation of Penal Code[1] section 182, subdivision (a)(1);
>
> Counts 2, 14 – Kidnapping, in violation of section 207, subdivision (a);
>
> Counts 3, 5-8, 17, 20: Forcible rape, in violation of section 261, subdivision (a)(2);
>
> Counts 4 – Rape by foreign object, in violation of section 289, subdivision (a)(1)(A);
>
> Counts 9, 11-13, 18-21: Forcible oral copulation, in violation of section 288a, subdivision (c)(2)(A);
>
> Counts 10, 16: Sodomy by use of force, in violation of section 286, subdivision (c)(2)(A);

(2 C.T. 431-464; 4 C.T. 1271-1317.)

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[1] Unless otherwise noted, subsequent citations to statutes will be to the California Penal Code.

Counts 2 through 13 named Jane Doe 1 as the victim, while counts 14 through 21 named Jane Doe 2 as the victim. The jury made true findings on allegations related to the "one strike law," section 667.61, subdivisions (b)(c)(e), that the crimes were committed during a kidnapping, multiple victims, and use of deadly weapon, as well as allegations that appellant personally used a knife during the assaults. (2 C.T. 431-464; 4 C.T. 1271-1317.)

On January 31, 2013, appellant was sentenced to consecutive terms of 25 years to life on counts 3 and 15, plus 4 years each for the use of a weapon pursuant to section 12022.3, subdivision (a). Terms on the remaining counts were imposed concurrent to counts 3 and 15. Appellant's aggregate term of imprisonment was 50 years to life plus 8 years. (4 C.T. 969-972, 1326-1331.)

In case number D063428, the Court of Appeal reversed both appellants' sentences, and remanded for resentencing. The sentencing court was ordered to "consider all mitigating circumstances attendant in the appellants' crimes and lives and impose a time when they may seek parole from the parole board consistent with the holding in *Graham, supra*, 560 U.S. at p. 82." (Slip Op. at p. 42.)

This court granted the People's Petition for Review on April 15, 2015, and deferred briefing pending decisions in *In re Alatriste*, S214652, *In re Bonilla*, S214960, and *People v. Franklin*, S217699. On

August 17, 2016, the parties in this case were ask by this court to serve and file briefs on the question presented.

STATEMENT OF FACTS

On the afternoon of September 3, 2011, two 16-year-old girls, Jane Doe No. 1 and Jane Doe No. 2, attended a birthday party with Jane Doe No. 1's family. (3 R.T. 414-415; 4 R.T. 542-543.) In the late afternoon, the two girls left the party went for a walk. They sat down by a tree to talk. (3 R.T. 420-421; 4 R.T. 549.) Two boys wearing dark clothing and "hoodies" walked by on a dirt path. (3 R.T. 422; 4 R.T. 551.) The girls testified the two boys suddenly tackled them from behind. (3 R.T. 423, 426; 4 R.T. 549-553.) Jane Doe No. 2 identified both defendants in court. (3 R.T. 430.) Doe No. 1 identified only Rodriguez. (4 R.T. 572.)

The girls were pushed and pulled across the street and up a hill to a flat, more secluded area. (3 R.T. 424-427; 4 R.T. 556, 560-562.) Co-defendant Rodriguez threatened Doe No. 2 with physical harm if she screamed, but she could not remember if appellant also made threats. (3 R.T. 440-450.) Rodriguez removed Doe No. 2's panties, and raped her vaginally, then turned her over and entered her anally. (3 R.T. 433-436.) The boys then switched, and appellant made Doe No. 2 take off her dress. (3 R.T. 439-441.) He held a knife to her

neck. (3 R.T. 441-443.) Doe No. 2 said appellant placed his penis in her mouth twice. (3 R.T. 443.) Then he inserted his penis into her vagina again while she sat on top of him. (3 R.T. 445.) She thought appellant ejaculated inside her, and also in her mouth. (4 R.T. 503.) The boys switched again, and Rodriguez placed his penis in Doe No. 2's mouth. (3 R.T. 448.)

The boy Doe No. 2 identified as appellant made Doe No. 1 lie down, and he removed her panties, and tried to take off her dress. (4 R.T. 562.) He finally removed Doe No. 1's dress and bra with her assistance, and tried unsuccessfully to place his penis in her vagina. (4 R.T. 563-564.) He then placed his fingers inside of her instead. (4 R.T. 565.) After a few seconds, he was able to place his penis inside of her. (4 R.T. 566.) The boy then made Doe No. 1 orally copulate him, and he touched her breasts. (4 R.T. 567.) After about 90 seconds, he placed his penis inside her vagina again. (4 R.T. 569.) The boys switched, and the second boy, whom she identified as co-defendant Rodriguez, then raped Doe No. 1. (4 R.T. 571-573.) Rodriguez had her orally copulate him twice, and then anally penetrated her. (4 R.T. 575-578.) The boys switched and the first boy made her orally copulate him again. (4 R.T. 580-581.) The first assailant ejaculated in her mouth, and she spit it out, getting some on her hair and clothing. (4 R.T. 617.) Rodriguez came back to Doe No. 1, kissed her, and told

her she was beautiful. He said she would have been her boyfriend if he had known her before. (4 R.T. 582.)

When they were finished, the boys told the girls to get dressed, and told them not to say anything. (4 R.T. 475, 583.) Rodriguez told Doe No. 2 she was beautiful. (4 R.T. 476.) The boys told the girls to crouch on the ground, so they could not be seen from the street. (4 R.T. 479.) When the boys were gone, the girls walked to the street and met Doe No. 1's parents walking in the park looking for them. (4 R.T. 480-483, 600; 5 R.T. 653-663.) They got in the parents' car and the girls said they had been raped. (4 R.T. 483-485, 602-603; 5 R.T. 665-668.) Doe No. 1's mother called the police, who came to the scene and took the girls' statements. The girls were then taken to the hospital. (4 R.T. 486-490, 605-606.)

Doe No. 2 identified co-defendant Rodriguez as the person who attacked her first, and appellant as Doe No. 1's first attacker. (3 R.T. 429.) She testified appellant was initially wearing a bandana, but that it slipped off at some point. (3 R.T. 430.) During the preliminary hearing, however, Doe No. 2 said she recognized appellant in court only because of his eyes, and that she could not remember if his bandana was ever off. (4 R.T. 510-511; P.H.T. 111.) Doe No. 1 did not identify appellant, and said that the second assailant wore a bandana the whole time. She did identify Rodriguez as one of the two assailants. (4 R.T. 572, 617, 623.)

ARGUMENT

MR. CONTRERAS'S SENTENCE OF 58 YEARS TO LIFE VIOLATES THE EIGHTH AMENDMENT BECAUSE FOR A JUVENILE OFFENDER IT IS THE FUNCTIONAL EQUIVALENT OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

A. Procedural And Factual Background

Appellant, born on January 16, 1995, was 16 years old at the time of the offense. His attorney argued in a sentencing motion that an indeterminate sentence violated the Eighth Amendment, as well as article I, § 17 of the California Constitution. (3 C.T. 760.) He presented reports by two mental health professionals that concluded he was not a sexual deviant, and showed no predisposition to sexual assault. He had no significant prior criminal history, and no prior history of sexual offenses. (3 C.T. 768-770, 780-805.)

At the hearing, counsel asked for a determinate sentence, or alternatively 15 to life. (16 R.T. 2928.) The court rejected the constitutional argument, and imposed consecutive terms of 25 to life, telling appellant, "You don't get a free victim." (16 R.T. 2935.) The court also imposed 8 years for use of a knife. (*Ibid.*)

On appeal, the Court of Appeal recognized the rationale that "children are constitutionally different from adults for purposes of sentencing. . . ," and that "the penological goals of retribution, deterrence, incapacitation, and rehabilitation do not provide

adequate justification for sentences of life without parole for juvenile nonhomicide offenders." (Slip Op., at pp. 38-39, citing *Guttierez, supra*, 58 Cal.4th at p. 1375 and *Graham, supra*, at p. 71.) The court also noted that this court held in *Caballero* that categorical ban on LWOP also applies to aggregate sentences that are the functional equivalent. (Slip Op. at p. 40, citing *Caballero, supra*, 55 Cal.4th at p. 268.) The court concluded:

> Pending further guidance, we must consider the constitutional propriety of Rodriguez's and Contreras's sentences in light of the two interrelated requirements underpinning *Graham*'s holding: (1) a state must give a juvenile nonhomicide offender a realistic chance to demonstrate maturity and reform, and (2) a state may not decide at the time of sentencing a juvenile nonhomicide offender is 'irredeemable' and 'never will be fit to reenter society.' (*Graham, supra*, 560 U.S. at pp 75, 79, 82.) Rodriguez's and Contreras's sentences do not meet either requirement. Even under an optimistic projection of their life expectancies, the sentences preclude any possibility of parole until they are near the end of their lifetimes as the parties agree Rodriguez will be 66 and Contreras will be 74 when they are first eligible for parole. This falls short of giving them the realistic chance for release contemplated by Graham. Instead, the sentences tend to reflect a judgment Rodriguez and Contreras are irretrievably incorrigible. While this judgment may ultimately prove to be correct, it is not one Graham permits to be made at the outset.

Accordingly, we conclude the sentences violate the Eighth Amendment under the standards articulated in Graham.
(Slip Op. at pp. 40-41.)

Appellant now asks this court to affirm the Court of Appeal's opinion.

B. A Mandatory Sentence Of Life Without The Possibility Of Parole, Or Its Functional Equivalent, Violates The Eighth Amendment When Imposed For A Crime Committed By A Juvenile Offender

1. *Roper, Graham,* and *Miller* Established That Juvenile Offenders Have A Different Level of Culpability and Must Be Given The Opportunity To Demonstrate Maturation And Rehabilitation

Over the last decade, beginning with *Roper,* the United States Supreme Court has grappled with whether the Constitution's ban on cruel and unusual punishment prohibits the harshest punishments when the offender committed crimes as a juvenile. The high court determined that the Eighth Amendment does mandate that children must be treated differently than adults when sentenced for very serious offenses.

The court relied in large part on a body of medical and social science research that shows significant and fundamental differences between the workings of adult and juvenile minds. (*Miller,* 132 S.Ct. at p. 2646; *Graham,* 560 U.S. at p. 68.) In *Graham,* for example, the court commented:

> . . . developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are also more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are actions of adults.

(*Graham*, 560 U.S. at p. 68.)

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Roper v. Simmons, supra,* 543 U.S. 551, the high court held that the death penalty cannot be inflicted on a person who was under 18 when he committed a capital crime. In *Graham v. Florida, supra,* 560 U.S. 48, the court held that a punishment of LWOP inflicted on a minor for a non-homicide offense constitutes cruel and usual punishment. And in *Miller v. Alabama, supra,* 132 S.Ct. 2455, 183, it held the Eighth Amendment is violated when a mandatory LWOP sentence is imposed on a minor who commits murder.

These cases are based on three factors that distinguish adults from juveniles and make juveniles less deserving of the most severe punishments: (1) children have a lack of maturity and an underdeveloped sense of responsibility that lead to recklessness, impulsivity and heedless risk-taking; (2) children are more

vulnerable to negative influences and outside pressures, have limited control over their own environment and lack the ability to extricate themselves from horrific crime-producing settings; and (3) a child's character is not as formed as an adult's and his actions are less likely to be evidence of irretrievable depravity. (*Miller, supra,* 132 S.Ct. at p. 2464.)

An amicus brief filed in *Miller* by the American Medical Association and the American Academy of Child and Adolescent Psychiatry described the difference between an adult and juvenile offender in more detail:

> The differences in behavior have been documented by scientists along several dimensions. Scientists have found that adolescents as a group, even at later stages of adolescence, are more likely than adults to engage in risky, impulsive, and sensation-seeking behavior. This is, in part, because they overvalue short-term benefits and rewards, and are less capable of controlling their impulses making them susceptible to acting in a reflexive rather than a planned voluntary manner. Adolescents are also more emotionally volatile and susceptible to stress and peer influences. In short, the average adolescent cannot be expected to act with the same control or foresight as a mature adult.
>
> Behavioral scientists have observed these differences for some time, but only recently have studies provided an understanding of the neurobiological underpinnings for

> why adolescents act the way they do. For example, brain imaging studies reveal that adolescents generally exhibit greater neural reactivity than adults or children in areas of the brain that promote risky and reward-based behavior. These studies also demonstrate that the brain continues to mature, both structurally and functionally, throughout adolescence in regions of the brain responsible for controlling thoughts, actions, and emotions. Together, these studies indicate that the adolescent period poses vulnerabilities to risk taking behavior but, importantly, that this is a temporary stage.[2]

While the State is not required to guarantee a juvenile offender eventual freedom, the State must provide such offenders "*some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.*" (*Graham*, 560 U.S. at p. 75, emphasis added.) In other words, while the Eighth Amendment may not completely foreclose the possibility of a juvenile offender spending his entire life behind bars, it forbids "States from making the judgment at the outset that those offenders never will be fit to reenter society." (*Id.* at p. 75.)

In *Miller*, the high court extended *Graham's* reasoning to homicide offenses, concluding that a life-without-parole sentence

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[2] As of January 10, 2017, the full text of the brief was accessible at http://fairsentencingofyouth.org/wp-content/uploads/2013/01/ac-10-9646-10-9647-Brief-for-the-American-Medical-Association-et-al.pdf.

imposed on a child may violate the Eighth Amendment. *Graham's* categorical ban on life without parole sentences for juveniles only applies to non-homicide offenses, but the mitigating factors of youth discussed in *Graham* implicate any life-without-parole sentence for a juvenile. (*Miller*, 132 S.Ct. at 2465.) Consequently, *Miller* held that when a penalty scheme mandates imposition of life without parole sentence for any crime committed as a juvenile without considering the mitigating factors of youth, it violates the Eighth Amendment. (*Id.* at p. 2466.)

While *Miller* left open a possibility that some juvenile homicide offenders will have shown by their crimes to be irreparably corrupt (and, thus, deserving of a life without parole sentence), the high court held that proper occasions for such a sentence will be uncommon. (*Id.* at p. 2469.)

2. *Caballero* and *Gutierrez* Apply the High Court's Rationale to Terms that are the Functional Equivalent to Life Without Parole

In *Caballero*, this court addressed the applicability of *Graham* and *Miller* to a term-of-years sentence (110 years to life), under which the offender's first parole eligibility date is expected to occur outside the offender's natural life expectancy. (*Caballero*, 55 Cal.4th at p. 267, fn. 3.) *Caballero* held that such a sentence violates the Eighth Amendment. (*Id.* at p. 268.) In so doing, this court rejected the Attorney General's narrow interpretation of *Graham* as

inapplicable to a case in which the sentence is not explicitly "without parole." (*Ibid.*)

While *Caballero* dealt with a functional life without parole sentence for a non-homicide offence, this court acknowledged *Miller's* dictate that offenders convicted of homicide committed as juveniles cannot receive a mandatory life without parole sentence. (*Caballero*, 55 Cal.4th. at p. 268, fn. 4.) Later, in *Gutierrez*, 58 Cal.4th 1354, this court formally extended the protections of an individualized *Miller* sentencing hearing to a case in which the defendant was convicted of first degree special circumstance murder when he was a juvenile. (*Id.* at p. 1390.)

3. In *Franklin*, this Court Holds that Section 3051 Provides a Hope of Parole for all Offenders Except Those in Appellant's Position, Despite the High Court's Mandate that Appellant Be Afforded a Reasonable Opportunity to Demonstrate His Suitability for Parole

In *People v. Franklin*, this court granted review to answer two questions: "Does Penal Code section 3051 moot Franklin's constitutional challenge to his sentence by requiring that he receive a parole hearing during his 25th year of incarceration? If not, then does the state's sentencing scheme, which required the trial court to sentence Franklin to 50 years to life in prison for his crimes, violate Miller's prohibition against mandatory LWOP sentences for juveniles?" (*Franklin, supra*, 63 Cal.4th at p. 268.) Because this court

answered the first question in the affirmative, it did not need to address the second question, leaving that for another day. (*Ibid.*) The day has arrived.

Section 3051 took effect on January 1, 2014, after the California Legislature, in response to *Graham*, *Miller*, and *Caballero*, enacted Senate Bill 260 regarding youth offender parole hearings. Stats 2013 ch 312 provides:

> SECTION 1. 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 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) 560 U.S. 48, and *Miller v. Alabama* (2012) 183 L.Ed.2d 407. Nothing in this act is intended to undermine the California Supreme Court's holdings in *In re Shaputis* (2011) 53 Cal.4th 192, *In re Lawrence* (2008) 44 Cal.4th 1181, and subsequent cases. It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.

(2013 Cal ALS 312, 2013 Cal SB 260, 2013 Cal Stats. ch. 312.)

Under section 3051, for individuals convicted of a crime committed before age 18, the Board of Parole Hearings ("the Board") is required to conduct a first youthful offender parole hearing in the 15th, 20th, or 25th year of the offender's incarceration. (§ 3051, subd. (b)(1).) For individuals like the defendant, Tyris Franklin, who received a base term of 25 to life, plus 25 for use of a gun, the youthful parole hearing would be in his 25th year of incarceration. (§ 3051, subd. (b)(3).) If not granted parole at his first hearing, the Board will set a subsequent parole hearing date for Franklin three to fifteen years from the date of denial of parole, unless the Board makes a discretionary finding that an earlier parole hearing date is appropriate. (§ 3041.5, subds. (b)(3) and (4).)

This court found that the new statutory provisions, which ensured Franklin a parole hearing after 25 years, was adequate to cure any constitutional deficiency with his sentence, if he was

afforded at the time of his sentencing "sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Franklin, supra,* 63 Cal.4th at p. 284.)

The Legislature passed Senate Bill 260 for the express purpose of addressing the constitutional issues raised in *Graham,* and it covers the most serious of crimes – homicides – even though that is the one category of crime not entirely prohibited from a term of life without parole. However, it expressly excluded offenses such as those committed in the instant case, leaving it to this court to provide a remedy that aligns with the Constitution.

C. Appellant's Mandatory Sentence Of 58 Years To Life Violates *Miller* And *Graham*

Appellant will be 74 when he becomes eligible for parole. The question is whether having the first opportunity for release at that age violates either the letter or the spirit of the Supreme Court's mandate that a juvenile offender be given a meaningful opportunity for parole.

The Attorney General cites Centers for Disease Control statistics that the total life expectancy of a male in the United States is approximately 76.2 years, and argues since appellant will have a parole hearing approximately two years before he is expected to die, "a sentence of 50 years to life and 58 years to life is not the functional equivalent of LWOP and therefore may be constitutionally

imposed." (BOM at pp. 9-10.) The Attorney General's argument is flawed.

1. The Attorney General's Argument Ignores the High Court's Intent to Give a Youthful Offender the Opportunity to Show Maturity and Rehabilitation

The *Graham* court insisted on a categorical rule that "gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." (*Graham, supra,* at p. 79.) "A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual." (*Ibid.*) It is safe to assume that a teenager entering prison with no hope of release for almost 60 years sees no light at the end of the tunnel, and similarly has little to no incentive to "become a responsible individual."

What led *Graham* to categorically ban life without parole sentences for nonhomicides and *Miller* to prohibit mandatory imposition of such sentences for homicide offenses is that it "alters the offender's life by forfeiture that is irrevocable," without giving hope that good behavior and character improvement would give a meaningful possibility of a release. (*Graham,* 560 U.S. at p. 70.) *Graham* contrasted such a sentence with a life sentence that survived an 8th Amendment challenge in *Rummel v. Estelle* (1983) 445 U.S.

263, reasoning that the sentence provided for the possibility of parole after twelve years.

Because the sentences imposed in this case offer both defendants nothing more than a hope for a "geriatric release," such prospect is not likely to create an incentive for rehabilitation and character improvement. (*Graham*, 560 U.S. at p. 70.) Turning the inquiry regarding meaningful opportunity to obtain parole into an actuarial analysis, as proposed by the Attorney General, misses the rationale of *Graham* and *Miller*, and does not provide these boys any hope that their efforts at rehabilitation and character improvement will pay off with the opportunity for life after prison.

2. The Attorney's General's Reliance on Life Expectancy for Males in the United States Does Not Consider Circumstances or Statistics

As shown above, there is no basis for assuming the high court contemplated a geriatric parole date when it mandated a meaningful opportunity for release. Even if there was some basis for accepting that assumption, however, the age statistic cited by the Attorney General has no relevance to the life expectancy of these two defendants.

In a 2014 report, Dr. Kent Imai compiled extensive statistics on the life expectancies and causes of death for California's huge inmate population. (Imai, Kent, Analysis of 2014 Inmate Death Reviews in the California Correctional Healthcare System (July 30,

2015)

http://www.cphcs.ca.gov/docs/resources/OTRES_DeathReviewAnalysisYear2014_20150730.pdf (current as of January 10, 2017).)

The report conclusively shows than an inmate's life expectancy in a California prison is dismal.

The average age of death in 2014 is 56 – nearly 20 years younger than the average for males nationwide. (Imai report, *supra*, at p. 7.) Suicide was the fourth leading cause of death, as it was in the previous six years, followed by drug overdose, and homicide in seventh place. (*Ibid.*) Over nine years, there was an average of 33.5 suicides a year in California prisons, more than twice the national average. (*Id.* at p. 17.) There was a nine-year average of 16 homicides per year, more than three times the national average. (*Id.* at p. 18.) Younger inmates were far more likely to die of suicide, drug overdose, or homicide, with the average age for those causes of death being 39. (*Id.* at p. 7.)

Even going by the Attorney General's suggested age of 76.2, that number is based on averages, which means a significant number of males will not live to that age. Per the 2012 Centers for Disease Control report, a male in the United States has approximately a 36 percent chance of dying before reaching the age of 75. (Arias, Heron, and Xu, National Vital Statistics Reports, United States Life Tables 2012 (Nov. 28, 2016) p. 4, table B,

https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_08.pdf (as of January 11, 2017) [showing that out of 100,000 males born alive, 64,068 will still be alive at age 75.)

Once again, the question for this court: If the appellants in this case have a 30 to 35 percent chance of dying before their first parole hearing (realistically much higher in prison), can that be considered a meaningful possibility of release? We submit that it does not. Particularly when, statistically, it must be presumed that there is even less of a chance that both of these young men will survive long enough to hope for a life outside of prison.

3. Other Jurisdictions Agree a Term of 50 Years to Life Violates the Eighth Amendment for A Juvenile Offender

In some states, such as Florida, a term of life means life without parole. Thus, the State of Florida responded to the remand in *Graham v. Florida* by reversing Terrance Graham's life term, and sentencing him instead to a determinant term of 25 years.

(Kunerth, *Life Without Parole Becomes 25 Years for Terrance Graham, subject of U.S. Supreme Court case,* Orlando Sentinel (Feb. 24, 2012) http://articles.orlandosentinel.com/2012-02-24/features/os-life-without-parole-terrance-graham-20120224-12_1_terrance-graham-resentencing-parole.)

Since then, the Florida Legislature has established a sentencing scheme by which any juvenile who commits a non-homicide offense and is sentenced to a term of more than 15 years,

will have a review of his or her sentence after 15 years. (Fla. Stat. § 921.1402, subd. (c); *Landrum v. State* (Fla, 2016) 192 So.3d 459.)

Several states have found that terms close to 50 years before parole eligibility for homicide offenses do violate the Eighth Amendment if the court did not do the kind of particularized consideration required by *Miller*. In *State v. Null* (Iowa 2013) 836 N.W.2d 41, for example, the Supreme Court of Iowa invalidated the sentence of a 17-year-old who would be 69 before his first parole hearing. (*Id.* at p. 45.) The court held that the defendant's sentence violated *Miller* and *Graham*. (*Id.* at p. 73.) *Null* acknowledged that the evidence before it did not clearly establish the defendant's prison term was beyond his life expectancy; his sentence could come within two years of that date, but would not exceed it. (*Id.* at p. 71.) Nevertheless, *Null* did not find that applicability of *Miller* and *Graham* "should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates." (*Id.* at p. 72.)

Instead, the most important factor was the repeated emphasis in *Roper*, *Graham*, and *Miller* on the lessened culpability of juveniles, how difficult it is to determine whether a juvenile offender is truly irredeemable, and the importance of providing a juvenile offender a meaningful opportunity obtain release based on demonstrated maturity and reform. (*Null*, 836 N.W.2d at p. 72.) Given that

rationale, *Null* held that the protection of an individualized sentencing hearing under *Miller* extends "to a lengthy term-of-years sentence." (*Ibid.*)

More recently, the Supreme Court of Wyoming followed *Null* to find that the sentence for a murder committed at age 17, under which the defendant would be first eligible for parole in 45 years (at age 61), is a de facto life without parole sentence. (*Bear Cloud v. State* (Wyo. 2014) 334 P.3d 132.) *Bear Cloud* agreed with *Null's* conclusion that "as a practical matter, a juvenile offender sentence to a lengthy term-of-years sentence will not have a "meaningful opportunity for release." (334 P.3d at p. 142.) In support of this conclusion, *Bear Cloud* also cited the fact that the United States Sentencing Commission equates a sentence of 470 months (39.17 years) to a life sentence. (*Id.*)

Finally, in *State v. Mason* (La.App. 2012) 86 So.3d 662, an intermediate appellate court in Louisiana considered the validity of the trial court's attempt to implement *Graham* by modifying the defendant's life sentence for aggravated rape to a life sentence with parole eligibility after 50 years. Mason held that if the defendant were required to serve 50 years of his sentence without being eligible for consideration for parole until he was 67, "[w]e find that this does not give the defendant a meaningful opportunity to obtain release based on demonstrate maturity and rehabilitation" within

the meaning of Graham. (*Id.*, at p. 665-666 [ordering compliance with *State v. Dyer* (2011) 77 So.3d 928, the Supreme Court's ruling entitling juvenile offenders of non-homicide offenses to parole consideration once they reach the age of 45 years and have served 20 years of their sentences in actual custody].)

4. Despite the United States Supreme Court Mandate, a Juvenile Defendant Sentenced to 58 Years to Life Will Spent More Time in Prison and it Will Be More Difficult Than a Mature Adult Given the Same Sentence

A juvenile offender's "lessoned culpability" for even a homicide offense (*Roper, supra*, 543 U.S., at 569) presumably means at least the possibility for less real time, in years, spent in prison than an adult offender. But acceptance of the Attorney General's argument in this case would have the opposite impact, with youthful offenders spending more time, not less, than their adult counterparts.

If appellant lives long enough to have a parole hearing and be released at age 74, he will have spent more years in prison than adults who receive the same term for the same crime, but pass away at 76.2 years, as predicted by the Attorney General. Based on that life expectancy, appellant's actual time spent in prison, for example, will be 22 years longer than the adult who commits the same crime at age 40.

This fact was recognized by the United States Supreme Court in *Graham*, when it noted the imposition of such a sentence is especially harsh on a 16 or a 17-year old because the juvenile "will on average serve more years and a greater percentage of his life in prison than an adult offender." (*Graham*, 650 U.S. at p. 70.)

If these appellants survive to their first parole hearing and are granted parole, they will have spent their entire adult lives behind bars. They will never have the experience of any normal adult life in the community, like holding a job or raising a family. This is unlike the adult offender, who did have an opportunity for those adult experiences.

The time served by appellants will be different as well. It should go without saying that time spent in prison as an adolescent or young man is "harder time" than for a mature adult. As one youthful offender serving time at San Quentin wrote for the New York Times:

> In my observation, the incarceration of young prisoners in adult prisons has an extremely destructive effect. Young prisoners are more susceptible to negative influences than adults. Facing the reality of their lengthy sentence and potentially never going home makes them seek protection and try to fit in somewhere in their new world. Because a juvenile's identity is still developing, he or she can potentially adopt negative behaviors that are the norm in a hostile prison

> environment. The fear of being victimized or assaulted produces a need for security, which leads many young prisoners to rely on gangs and weapons for survival. Young prisoners overwhelmed by feelings of helplessness and hopelessness cannot focus on changing their thinking and behavior, because they are focused on how to survive. Younger prisoners are also at a disadvantage because they are not as mature (mentally and physically) as older prisoners. The suicide and sexual abuse rates of younger prisoners are higher than those of the physically mature.

(Scott, Gary *Prison is Too Violent For Young Offenders*, N.Y. Times (June 5, 2012) http://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/prison-is-too-violent-for-young-offenders [written by an inmate who was sentenced at age 17 to 15 years to life for second degree murder; he had served nearly 15 years at the time of this writing].)

For these two appellants, who will spend more time and harder time than if they had committed their offenses as adults, telling them they will have a parole hearing 50 years or longer in the future does not provide them with a meaningful opportunity for release. Rather, it is a sentence which for them, holds no hope for a future.

D. Appellants Should Be Considered For Parole After A Reasonable Period Of Years That Gives Them An Opportunity For Life After Prison

While a term of 50 years to life or 58 years to life is functionally a term of life without parole that will violate the Eighth

and Fourteenth Amendments, there remains the question of a remedy.

The Attorney General, in a footnote, suggests that appellants may be eligible for a parole hearing at age 60 under a CDCR Elderly Parole Program. (BOM at p. 9, fn 5.) This is no remedy. Based on everything discussed above, this goes no further than allowing for a geriatric release that was not contemplated by the high court's rulings. Further, a bill to codify the program died in the Legislature (see Senate Bill 224 (2015) Elderly Parole Program), so any such program can be terminated by CDCR at any time.

Finally, reliance on a similar remedy was squarely rejected by the federal court in *LeBlanc v. Mathena* (4th Cir. Va. 2016) 841 F.3d. 256. The Fourth Circuit held in *LeBlanc* that it was objectively unreasonable for the Virginia state courts to conclude that a geriatric release afforded petitioner the meaningful opportunity to obtain release. (*Id.* at p. 260.) The court rejected the Virginia Supreme Court's decision in *Angel v. Commonwealth* (Va.App. 2011) 281 Va. 248, which held that a "geriatric release" statute (Va. Code, § 53.1-40.01) which allowed a parole hearing for all inmates who reached age 60 and had served at least 10 years, satisfied *Graham* and the Eighth Amendment for a juvenile offender sentenced to multiple life terms for sexual assault. Among other reasons, the Circuit Court found it most significant that reliance on the geriatric release statute

for relief treated juvenile offenders worse than their adult counterparts:

> More significantly – and as the district court correctly noted – Geriatric Release treats juvenile offenders sentenced to life imprisonment 'worse' than adult offenders receiving the same sentence because juvenile offenders 'must serve a larger percentage of their sentence than adults do before eligibility to apply for geriatric release.' [Citation] For example, under Geriatric Release, a fifty-year-old sentenced to life in prison will be eligible to apply for Geriatric Release in ten years, but a sixteen-year-old will have to serve forty-four years before receiving his first opportunity to apply for Geriatric Release. *Graham* emphasized that a life sentence is 'especially harsh' for a juvenile offender relative to an adult offender because, under such a sentence, the 'juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.' 560 U.S. at 70. Given that (1) the Supreme Court specifically held that sentencing systems that require juvenile offenders to serve more years and/or a greater percentage of their lives relative to adult offenders violate the Eighth Amendment's proportionality principle and that (2) Geriatric Release subjects juvenile offenders to longer – and proportionately longer – sentences, it was objectively unreasonable to conclude that Geriatric Release complied with *Graham*.

(*Id.* at p. 272.)

It is abundantly clear, therefore, that any similar program in California also would not pass constitutional muster. It would not provide any "meaningful" opportunity for parole based on demonstrated maturity and rehabilitation, but would instead treat juveniles even more harshly than adult offenders.

The California Legislature's remedy pursuant to *Graham* and *Miller* for juvenile offenders with life sentences was that they be given a youth offender parole hearing after no more than 25 years. (Pen. Code, § 3051.) While the potential for relief is afforded to those committing even first degree murder, defendants such as the appellants in this case are expressly excluded from consideration for parole under the statute. (§ 3051, subd. (h).) Nevertheless, appellant, with non-homicide offenses, is exactly the type of offender contemplated in *Graham*, which recognized a distinction between an irrevocable homicide offense and all other offenses.

The United States Supreme Court "has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. [] There is a line 'between homicide and other serious violent offenses against the individual.' [] Serious nonhomicide crimes 'may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and

irrevocability.' [] This is because '[l]ife is over for the victim of the murderer,' but for the victim of even a very serious nonhomicide crime, 'life . . . is not over and normally is not beyond repair.' [] Although an offense like robbery or rape is 'a serious crime deserving serious punishment,' [] those crimes differ from homicide crimes in a moral sense." (*Graham, supra,* at p. 69, citing *Kennedy v. Louisiana* (2008) 554 U.S. 407; *Enmund v. Florida* (1982) 458 U.S. 782; *Tison v. Arizona* (1987) 481 U.S. 137; and *Coker v. Georgia* (1977) 433 U.S. 584.)

"It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." (*Graham, supra,* at p. 70.) Appellants, with less moral culpability than a juvenile murderer, are entitled to at least the same consideration when it comes to a meaningful opportunity for parole.

Accordingly, appellant asks that the decision of the Court of Appeal be affirmed, and the case remanded for resentencing, with an order that the trial court is not bound by any mandatory sentencing scheme. Rather, the court should consider each appellant's age, their age-related characteristics, the nature of the crimes, and any evidence presented by the parties relevant to sentencing, and impose a term of no greater than 25 years to life.

CONCLUSION

Based on the foregoing, this court should affirm the opinion of the Court of Appeal, and remand for resentencing.

Dated: January 15, 2017

Respectfully submitted,

_____

NANCY J. KING
Attorney for appellant CONTRERAS

CERTIFICATE OF WORD COUNT

I certify that the word count of this computer-produced document, calculated pursuant to rule 8.504(d)(1) of the rules of court, does not exceed 25,500 words, and that the actual count is: 7,188 words.

Dated: January 15, 2017

_____
Nancy J. King

DECLARATION REGARDING SERVICE ON APPELLANT

Appellant's service copy of the Petition for Review is being held by counsel at appellant's written request.

I declare under penalty of perjury and the laws of the state of California that the foregoing is true and correct.

Dated January 15, 2017

_____
Nancy J. King
Attorney for appellant Contreras

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: *People v. Contreras, et. al*, D063428, Superior Court Case:

SCD236438

I, the undersigned, certify and declare:

I am over 18 years of age and not a party to this action. My business address is 1901 First Avenue, Suite 138, San Diego, CA 92101. I electronically served the CONTRERAS'S ANSWER BRIEF ON THE MERITS to the following parties the following parties from my email address of njking51@gmail.com:

Daniel J. Kessler (co-appellant's counsel) at: dan@bigbadlawyer.com

Appellate Defenders, Inc. at: eservice-criminal@adi-sandiego.com

The Office of the San Diego County District Attorney at: DA.Appellate@sdcda.org

The Office of the San Diego Public Defender at: ppd.eshare@sdcounty.ca.gov

Superior Court of San Diego, Judge Peter C. Deddeh at: Appeals.Central@SDCourt.ca.gov

The Answer Brief on the Merits was filed electronically with the Court of Appeal via TrueFiling.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 15, 2017

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NANCY J. KING