IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LEONEL CONTRERAS and WILLIAM STEVEN RODRIGUEZ, Defendants and Appellants.	S224564 (Court of Appeal No. D063428; San Diego County Superior Court No. SCD236438)

APPLICATION OF AMICUS CURIAE PACIFIC JUVENILE DEFENDER CENTER FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS LEONEL CONTRERAS AND WILLIAM STEVEN RODRIGUEZ

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **LEONEL CONTRERAS and WILLIAM STEVEN RODRIGUEZ,** **Defendants and Appellants.**	**S224564** **(Court of Appeal No. D063428; San Diego County Superior Court No. SCD236438)**

APPLICATION TO FILE AMICUS CURIAE BRIEF

The Pacific Juvenile Defender Center, through their attorneys and pursuant to California Rules of Court, rule 8.520(f), respectfully apply for leave to file the attached amicus curiae brief on behalf of appellants Leonel Contreras and William Steven Rodriguez.

At issue in this case is whether 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?

The Pacific Juvenile Defender Center (PJDC) is a regional affiliate of the Washington, D.C.-based National Juvenile Defender Center.

PJDC works to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. PJDC provides support to more than 500 juvenile trial lawyers, appellate counsel, law school clinical programs and non-profit law centers to ensure quality representation for children throughout California and around the country. Collectively, PJDC members represent thousands of youth in juvenile court delinquency cases and youth being tried as adults in California. PJDC also engages in policy work and involvement in appellate cases aimed at assuring fairness and appropriate treatment of young people in the justice system. In this regard, PJDC has long been concerned about the handling of youth in the adult criminal justice system. Last year, it participated with other amici curiae in the cases of *People v. Franklin* (2016) 63 Cal.4th 261, *In re Alatriste*, S214652, and *In re Bonilla*, S214960, filing an amicus brief in *Bonilla* regarding whether a total term of imprisonment of 50 years to life for murder committed by a 16-year-old offender is the functional equivalent of life without possibility of parole by denying the offender a meaningful opportunity for release on

parole. PJDC also participated with other amici curiae in *People v. Gutierrez* (2014) 58 Cal. 4th 1354 when this Court held that the Eighth Amendment forbids a presumption in favor of life without parole at sentencing hearings under Penal Code section 190.5. PJDC also participated in *People v. Caballero* (2012) 55 Cal.4th 262, in which this Court struck down the imposition of "de facto" life sentences on juveniles tried as adults. PJDC is knowledgeable about the relevant law, and the impact of age and immaturity on behavior, adjudicative competence and capacity for rehabilitation. PJDC is interested in this case because it presents a significant opportunity for the Court to apply the principles enunciated in recent Supreme Court cases, in particular *Miller v. Alabama* (2012) __ U.S. __, 132 S.Ct. 2455, on youthful offender sentences that would, at a minimum, result in potential release in old age after a lifetime in prison.

Our brief addresses the issue whether a total sentence of 50 years to life or 58 years to life is the functional equivalent of life without the possibility of parole for juvenile offenders. Amicus will address this issue and will provide a perspective that has not been presented to the

court in this matter. We will not duplicate arguments already made, but will present additional legal arguments and authority. Counsel for appellants are aware of our interest and support this application.

The State argues that appellants' sentences are not the functional equivalent of life without parole, based upon a life expectancy table from the Centers for Disease Control (CDC). Appellant Rodriguez with a 50-year-sentence will be eligible for parole when approximately 66 years old, while appellant Contreras will be 74 years old when first eligible for parole. The State contends that the CDC table shows that both appellants, who were 16-years-old at the time of the offenses, will live to approximately 76.2 years. The sentences imposed, argues the State, afford "appellants a meaningful opportunity for parole within their expected natural lifetimes." The State concludes that sentences of 50-years-to-life and 58-years-to-life are not the functional equivalent of life without parole sentences, and do not offend the Eighth Amendment, as interpreted by *Miller*. (BOM at pp. 9-10.)

We hope to assist the Court by demonstrating how this estimate is so flawed as to be meaningless, not least because it fails to account

for many individual differences within and across groups. We also hope to assist the Court in demonstrating that fealty to *Miller* and the Eighth Amendment lies not with life expectancy estimates at all, but with ensuring youthful offenders, like Leonel Contreras and William Rodriguez, receive a sentence that will certainly provide a "meaningful opportunity" to demonstrate the "maturity and rehabilitation" required to obtain release and reenter society.

February 15, 2017

Respectfully Submitted,

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BRIEF OF AMICUS CURIAE PACIFIC JUVENILE DEFENDER CENTER IN SUPPORT OF APPELLANTS LEONEL CONTRERAS AND WILLIAM STEVEN RODRIGUEZ

ISSUE ADDRESSED BY AMICI CURIAE

"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?"

PROCEDURAL AND FACTUAL HISTORY

Amicus curiae hereby adopts the Statement of the Case and Facts set forth in the Opening Brief on the Merits, beginning at page 1.

ARGUMENT

I. SENTENCES OF 50 YEARS TO LIFE AND 58 YEARS TO LIFE VIOLATE THE EIGHTH AMENDMENT BECAUSE, BY ANY MEASURE, THEY FAIL TO PROVIDE A MEANINGFUL OPPORTUNITY TO DEMONSTRATE THE MATURITY AND REHABILITATION REQUIRED TO OBTAIN RELEASE AND REENTER SOCIETY AS *MILLER V. ALABAMA* REQUIRES

A. Introduction

This Court must decide whether a minimum sentence of 50 years to life is the functional equivalent of life without parole and thus subject to the Eighth Amendment dictates of *Miller v. Alabama* (2012) __ U.S. __, 132 S.Ct. 2455.

The State argues that each of the appellants' sentences is not the functional equivalent of life without parole based upon a life expectancy table from the Centers for Disease Control (CDC): appellant Rodriguez with a 50-year-sentence will be eligible for parole when approximately 66 years old, while appellant Contreras will be 74 years old when first eligible for parole. The State contends that the CDC table shows that both appellants, who were 16-years-old at the time of

the offenses, will live to approximately 76.2 years. The sentences imposed, argues the State, afford "appellants a meaningful opportunity for parole within their expected natural lifetimes." It follows that sentences of 50-years-to-life and 58-years-to-life are not the functional equivalent of life without parole sentences, and do not offend the Eighth Amendment, as interpreted by *Miller*. (BOM[1] at pp. 7-8.)

The State's invitation is enticingly simple. One need only consult an actuarial table, and if it appears the defendant may be alive at the time of parole eligibility, then *Miller* and its Eighth Amendment concerns do not come into play.

However, this approach, while simple and expedient, is deeply flawed. As discussed below, life expectancy estimates, rather than answering the question when is a sentence the functional equivalent of life without parole, create much uncertainty and constitutional mischief. This is so because life expectancy estimates, are just that—estimates based on certain probabilities, not certainties. Indeed, the degree of accuracy of an estimate for any one person depends on

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1 "BOM" denotes "Opening Brief on the Merits."

the individual differences of a given group (or cohort) to which an individual is said to belong and how those differences affect life expectancy.

As we point out below, the estimates provided by the state are flawed because they fail to account for many individual differences, chief among them, a lifetime in a California state prison. As such, they most certainly overestimate the appellants' life expectancy after many decades of life in prison by many years. Sadly, available data indicates that Rodriguez, serving his 50-year-sentence, will likely die in his late fifties and, in any event, long before he will be eligible for parole.

Even if individual differences among groups were factored in, increasing the overall accuracy of life expectancy estimates, such an approach would still not eliminate uncertainties. Some persons will exceed their life expectancy and many others will not. But worse still, such a system of different life estimates for different groups would likely create constitutional havoc because it would be founded on unequal treatment.

So what is to be done? We believe complying with *Miller* and its

Eighth Amendment demands lies not with life expectancy estimates, but with ensuring youthful offenders with lengthy sentences, like appellants Leonel Contreras and William Rodriguez, receive a sentence that will certainly provide a "meaningful opportunity" to demonstrate the "maturity and rehabilitation" required to obtain release and reenter society. A 25 year to life sentence would come within this framework. A 50 year to life sentence would not.

B. The State's Life Expectancy Estimate Is Fatally Flawed

The State argues: "any term of imprisonment that provides a juvenile offender with an opportunity for parole within his or her expected natural lifetime is not the functional equivalent of LWOP." (BOM at p. 7.) The State assumes this is the law because *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*) and *People v. Caballero* (2012) 55 Cal. 4th 262 (*Caballero*) used terms like "natural life" (*Graham*, at p. 75) and "natural life expectancy" (*Caballero*, at p. 268). However, the reason *Graham* and *Caballero* employed such terms is because the Eighth Amendment violations at issue there involved sentences that plainly exceeded a lifetime. Accordingly, considering the 110 year to life

sentence in *Caballero*, this Court held: "we conclude 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)

However, neither *Caballero* nor *Graham* (nor *Miller*) was called upon to decide whether a lengthy sentence not exceeding life expectancy violates the Eighth Amendment. "'It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.'" (*People v. Knoller* (2007) 41 Cal.4th 139, 155, citations omitted.)

As we explain at Argument I.C, *post*, the date at which a defendant is expected, by some estimate, to die cannot be the point at which a sentence becomes unconstitutional under the Eighth Amendment within the meaning of *Graham* and *Miller*. The Supreme Court never intended this. However, even assuming life expectancy is key, we wish to point out that the State's life expectancy estimate is

fatally flawed.

Observing Rodriguez will be 66 years old when he becomes eligible for parole, the State asserts his total life expectancy to be approximately 76.2 years. (BOM at p. 9.) This estimate is based on a life expectancy table from the Centers for Disease Control (CDC)[2].

As discussed in *There Is No Meaningful Opportunity in Meaningless Data,* 18 U.C. Davis J. Juv. L. Pol'y 267, 279 (hereafter *"There Is No Meaningful Opportunity"),* "Life expectancy is a statistic that describes the 'center' of the distribution of the ages at which people in a birth cohort will die." Assuming that the estimate is perfectly accurate and precise, "[p]rison sentences that prevent people from being released until shortly before they reach average life expectancy ensures that almost one-half of them will have died before they reach that age." (*There Is No Meaningful Opportunity,* at p. 283.)

However, the State's life expectancy estimate is neither accurate nor precise because it fails to say anything about the differences in life

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[2] BOM at p. 9, citing Nat. Center for Health Statistics, Centers for Disease Control and Prevention, National Vital Statistics Reps., vol. 63 no. 7, United States Life Tables, 2010, table A.

expectancy across groups. The differences in life expectancy across groups are significant. (*Id.*, at p. 280.) "For example, according to the estimates of both the Vital Statistics and the Census Bureau, white females born in 1981 had, in 2001, a life expectancy of 60.6 years, for a total life expectancy of 80.6 years. Black men born in the same year had an estimated life expectancy of 50.3 years, for a total life expectancy of 70.3 years, a difference of more than a decade." (*Ibid.*)

Failing to consider documented differences in life expectancy based on race greatly overestimates the average life expectancy of young men and minorities and improperly introduces systematic bias by accepting the validity of some demographic data while rejecting or ignoring other data reported in the very same tables. (*There Is No Meaningful Opportunity*, at p. 271.)

There are many other differences across groups and within groups which, if unaccounted for, similarly greatly affect accuracy of any estimate. Not merely race and gender, but also region and economic status are crucial differences.

As it turns out, shorter life expectancy, more variance

> around the estimated center of the distribution, and volatility of the estimate over time are all characteristic of poorer groups within wealthier countries with overall high life expectancies.[fn.] In a recent study that combined geographic and racial disparities in survival, Cullen et al. found that life expectancies for white men in the U.S. were about 7% higher than for black men, but for the people who survived to the age of 10, white men were 17% more likely than black men to reach the age of 70. [footnote] Murray found that 'the life expectancy gap between the 3.4 million high-risk urban black males and the 5.6 million Asian females was 20.7 years in 2001.' 80 The biggest disparities in mortality between advantaged and disadvantaged groups were not among the very young and the very old, but in the age categories 15-44 and 45-59.[fn.]
>
> (*There Is No Meaningful Opportunity*, at pp. 282-283.)

Accordingly, "[t]aking into account the effect on life expectancy of variables that have long been studied by social scientists but are not included in U.S. Census or vital statistics reports - income, education, region, type of community, access to regular health care, and the like—further widens the observed and projected gaps in life expectancy between disadvantaged and privileged groups in the United States." (*Id.*, at p. 283.)

Parenthetically, we make one more point about life estimates.

Even if individual differences among groups were factored in, increasing the overall accuracy of life expectancy estimates, such an approach would still not eliminate uncertainties. Some persons will exceed their life expectancy and many others will not. But worse still, such a system of different life estimates for different groups would likely create constitutional havoc because it would be founded on unequal treatment.

In any event, the CDC life expectancy table relied upon by the State fails utterly to account for any differences in life expectancy between, across or within groups. Most alarmingly, it fails to account for the effect of long-term incarceration on health, morbidity and mortality.

It is settled that older prisoners, as a group, are "older" physiologically than they are chronologically, that their physical condition and health problems are characteristic of people ten or fifteen years older than their chronological age. (Ronald H. Aday & Jennifer J. Krabill, *Older and Geriatric Offenders: Critical Issues for the 21 st Century,* in, Special Needs Offenders in Correctional Institutions, (Lior Gordon

ed., 2013). *Old Behind Bars: The Aging Prison Population in the United States,* Human Rights Watch (Jan. 2012).)

By some estimates, incarceration accelerates the aging process by an average of 11.5 years. (U.S. Dept. of Justice, Nat. Inst. of Corrections, Correctional Health Care Report, 2004, at p. 10; see also Rikard & Rosenberg, *Aging Inmates: A Convergence of Trends in the American Criminal Justice System,* Journal of Correctional Health Care 13(3):150-162 (July 2007).) In recognition of this fact, the National Institute of Corrections defines elderly inmates as those with a chronological age of 50 years or older. (*Id.*, at p. 8.)

Death rates for prison inmates age 55 to 64 are 56% higher as compared to the general population. (Bureau of Prison Statistics, Data Brief: Medical Causes of Death in State Prisons, 2001-2004 (January, 2007), at p. 3.) A person suffers a two-year decline in life expectancy for every year locked away in prison. (Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State,* 1989–2003, 103 Am. J. of Pub. Health 523, 526 (2013).)

It is a shocking fact that in California in 2015, the average inmate

life expectancy for males was 57 years; 52 years for females. "Drug overdoses, suicides and homicides affected a significantly younger population, averaging 41 years at time of death. Excluding these three causes for death in the younger prison population, the average life expectancy in the male patients was 60 years, some 20 years shorter than that of the average American male." (*Analysis of 2015 Inmate Death Reviews in the California Correctional Healthcare System*, Table 4, at p. 10, Kent Imai, MD, consultant to the California Prison Receivership.) This figure all but guarantees that William Rodriguez will die in prison before becoming eligible for parole.

C. *Miller* Merely Requires Youthful Offenders with Lengthy Sentences, like Contreras and Rodriguez, Receive a Sentence That Will Certainly Provide a "Meaningful Opportunity" to Demonstrate the "Maturity and Rehabilitation" Required to Obtain Release and Reenter Society

In four successive decisions, the United States Supreme Court has made it clear that the Eighth Amendment demands that children be treated differently from adults for sentencing purposes. In *Roper v. Simmons* (2005) 543 U.S. 551, the Court held that the Eighth

Amendment bars capital punishment for children. In *Graham v. Florida, supra,* 560 U.S. 48 , the Court concluded that the Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a nonhomicide offense. Then in *Miller v. Alabama, supra,* 132 S.Ct. at pp. 2467-2468, the high court held that the Eighth Amendment is violated when a court imposes a mandatory life without parole sentence upon a juvenile in a homicide case.

Miller's rationale is drawn from *Roper* and *Graham* which "establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, [...] 'they are less deserving of the most severe punishments.'" (*Miller,* 132 S.Ct. at p. 2464.)

Miller observed that *Roper* and *Graham*

> [...] relied on three significant gaps between juveniles and adults. First, children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. (*Roper,* 543 U.S., at 569.) Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific,

> crime-producing settings. (*Ibid.*) And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." (*Id.*, at p. 570.)
>
> (*Miller*, 132 S.Ct. at p. 2464.)

Miller emphasized that the decisions in *Roper* and *Graham*" rested not only on common sense—on what 'any parent knows'—but on science and social science as well." (*Miller*, at p. 2464.) *Roper* "cited studies showing that '"[o]nly a relatively small proportion of adolescents"' who engage in illegal activity '"develop entrenched patterns of problem behavior."'" (*Miller*, at p. 2464.)

Graham noted "'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.'" (*Miller*, at p. 2464, quoting *Graham*, 30 S.Ct., at p. 2026.) The court "reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—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*, at pp. 2464-2465, quoting *Graham*, 30 S.Ct., at p. 2026 (citation omitted).)

Miller recalled that "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." (*Miller*, at p. 2465.) Retribution, deterrence, incapacitation, and rehabilitation simply do not work when imposing the harshest sentences on children. "Because '"'[t]he heart of the retribution rationale'"' relates to an offender's blameworthiness,'" the case for retribution is not as strong with a minor as with an adult.'"'" (*Miller*, at p. 2465, quoting *Graham*, 130 S.Ct., at p. 2028.)

Deterrence fails "because '"'the same characteristics that render juveniles less culpable than adults'"'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." (*Miller*, at p. 2465, quoting *Graham*, at p. 2028.) *Miller* recalled that "incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is

incorrigible'—but "'"incorrigibility is inconsistent with youth."'" (*Miller*, at p. 2465, quoting *Graham*, 130 S.Ct., at p. 2029.) "And for the same reason, rehabilitation could not justify that sentence. Life without parole 'forswears altogether the rehabilitative ideal.' It reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change." (*Miller*, at p. 2465, quoting *Graham*, 130 S.Ct., at p. 2030.)

Miller's invalidation of mandatory LWOP schemes for juveniles, even those convicted of murder, represents a "confluence of ... two lines of precedent": capital cases "requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death [citations]"; and opinions, such as *Graham* and *Roper*, imposing "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." (*Miller*, at pp. 2463-2464.)

Just as *Graham* had "viewed this ultimate penalty for juveniles as akin to the death penalty" in barring life without parole for non-homicide juvenile offenses, *Miller* looked to the longstanding rule

"demanding individualized sentencing when imposing the death penalty." (*Miller*, at pp. 2466-2467.) Just as capital punishment must be "reserved only for the most culpable defendants committing the most serious offenses [citations]" (*id.*, at p. 2467), "appropriate occasions for sentencing juveniles to this harshest possible penalty [LWOP] will be uncommon"(*id.*, at p. 2469). "That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" (*Id.*, at p. 2469.)

Mandatory life-without-parole schemes "prevent those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change' [citation] and run[] afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." (*Miller*, 132 S.Ct. at p. 2460.)

Thus, before forever foreclosing a juvenile offender's ability to seek future parole, a sentencing court must take account of the "central considerations" that dramatically reduce a youthful offender's

culpability. (*Id.*, at p. 2466.) "[T]hat stage of life ... is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.' [Citation.]" (*Id.*, at 2467.) But these "'signature qualities' are all 'transient' [citation]" (*id.*), such that a juvenile offender has much greater "capacity for change" and prospects for rehabilitation than an adult convicted of a similar offense (*id.*, at p. 2465).

Miller stressed: "[W]e require [a sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.[Fn.]" (*Miller*, 132 S.Ct. at p. 2469.) While "'[a] State is not required to guarantee eventual freedom,' [] it must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id.*, at p. 2469.)

Most recently, in *Montgomery v. Louisiana* (2016) 136 S.Ct. 718, the Supreme Court found *Miller* to be a substantive rule of law to be applied retroactively. In doing so, *Montgomery* emphasized,

> *Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for

> life without parole collapse in light of "the distinctive attributes of youth." *Id.*, at ----, 132 S.Ct., at 2465. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects '"unfortunate yet transient immaturity.'" *Id.*, at ----, 132 S.Ct., at 2469 (quoting *Roper* [*v. Simmons* (2005)] 543 U.S [551], 573, 125 S.Ct. 1183). Because *Miller* determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" 567 U.S., at ----, 132 S.Ct., at 2469 (quoting *Roper, supra,* at 573, 125 S.Ct. 1183), it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"-that is, juvenile offenders whose crimes reflect the transient immaturity of youth. *Penry* [*v. Lynaugh* (1989)] 492 U.S. [302], 330, 109 S.Ct. 2934.
>
> (*Montgomery*, 136 S.Ct. at p. 734.)

In view of the foregoing controlling principles, contrary to the State's argument, the date at which a youthful offender is expected to die cannot be the point at which a sentence becomes unconstitutional under the Eighth Amendment within the meaning of *Miller*. The Supreme Court could never have intended this. But nor can a sentence permitting, at most, a hypothetical release in the last decade of life comply with *Miller*. It stands to reason then, that a sentence of multiple decades, like a sentence of life without parole, also "prevents

those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change'" and so too "'runs afoul of [the Supreme Court's] cases' requirement of individualized sentencing for defendants facing the most serious penalties." (*Miller*, 132 S.Ct. at p. 2460.)

As the Iowa Supreme Court put it, considering the 52.5 year sentence of a youthful offender in *State v. Null*:

> Even if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*. The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a "meaningful opportunity" to demonstrate the "maturity and rehabilitation" required to obtain release and reenter society as required by *Graham*, 130 S.Ct. at 2030.

(*State v. Null* (Iowa 2013) 836 N.W.2d 41, 71.)

Youthful offenders like Leonel Contreras and William Rodriguez, facing multiple decades in prison, are entitled to an individualized sentencing no less than their counterparts facing LWOP sentences. It would be manifestly unjust, if not a cruel irony indeed, to

require *Miller* scrutiny at a sentencing under Penal Code section 190.5, on the one hand, as this Court in *People v. Gutierrez* (2014) 58 Cal. 4th 1354 requires, but then, on the other hand, withhold all such constitutional precautions to Contreras, Rodriguez and others whose sentences are "less" than LWOP, but still constitute most of a lifetime.

In striking down a 50-year aggregate sentence as constituting a defacto life sentence under *Graham*, the Connecticut Supreme Court analyzed the problem thus:

> A juvenile offender is typically put behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting. Even assuming the juvenile offender does live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left. A juvenile offender's release when he is in his late sixties comes at an age when the law presumes that he no longer has productive employment prospects. Indeed, the offender will be age-qualified for Social Security benefits without ever having had the opportunity to participate in gainful employment. See 42 U.S.C. § 416 (l) (defining "'retirement age'" under Social Security Act as between ages sixty and sixty-seven). Any such prospects will also be diminished by the increased risk for certain diseases and disorders that arise with more advanced age,

including heart disease, hypertension, stroke, asthma, chronic bronchitis, cancer, diabetes, and arthritis. See Federal Interagency Forum on Aging–Related Statistics, "Older Americans 2012: Key Indicators of Well–Being," (June 2012) pp. xvi, 27, available at http://agingstats.gov/agingstatsdotnet/Main_Site/Data/2012_Documents/Docs/EntireChartbook.pdf (last visited May 26, 2015).

The United States Supreme Court viewed the concept of "life" in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to truly reenter society or have any meaningful life outside of prison. See *Graham v. Florida, supra,* at 560 U.S. at 75 (states must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" for juvenile nonhomicide offender); see also *People v. Perez,* 214 Cal.App.4th 49, 57 (juvenile sentencing cases are concerned with whether "there is some meaningful life expectancy left " when the offender becomes eligible for release [emphasis added]), cert. denied, —— U.S. ——, 134 S.Ct. 527, 187 L.Ed.2d 379 (2013). In analogizing a life sentence without parole for a juvenile offender to the death penalty, *Graham* underscored the sense of hopelessness that accompanies such a sentence. See *Graham v. Florida, supra,* at 69–70, 130 S.Ct. 2011 (Life imprisonment without parole "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.... [T]his sentence means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold

> in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." [Citation omitted; internal quotation marks omitted.]). In light of the foregoing statistics and their practical effect, a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Id.*, at 79, 130 S.Ct. 2011. Thus, we agree with the Iowa Supreme Court that "[e]ven if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*." *State v. Null, supra,* 836 N.W.2d at 71; see also id. (concluding that prospect of "geriatric release" implicates concerns raised in Graham).
>
> (*Casiano v. Comm'r of Correction* (2016) 317 Conn. 52, 78–79, 115 A.3d 1031, 1046–47 (2015), cert. denied sub nom. Semple v. Casiano, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016).)

At a minimum, therefore, the cases of appellants Contreras and Rodriguez should be remanded for an individualized sentencing hearing that complies with *Miller*.

However, in order to comply with the demands of *Miller* and its antecedents, this Court need not engage in the hand wringing attending the awkward and dubious task of predicting when appellants, or any other youthful offender, will likely breathe his or her

last breath. We believe that fealty to *Miller* and the Eighth Amendment lies not with life expectancy estimates, but with ensuring youthful offenders, like Contreras and Rodriguez, receive, in fact, a sentence that will certainly provide a "meaningful opportunity" to demonstrate the "maturity and rehabilitation" required to obtain release and reenter society.[3] Bottom line: "children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, [...] 'they are less

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[3] Justice Werdegar called for this approach in *Caballero*:

> ... any term of imprisonment that provides a juvenile offender with an opportunity for parole within his or her expected natural lifetime is not the functional equivalent of LWOP. *Graham* does not require defendant be given a parole hearing sometime in the future; it prohibits a court from sentencing him to such a term lacking that possibility at the outset. Therefore, I would remand the case to the trial court with directions to resentence defendant to a term that does not violate his constitutional rights, that is, a sentence that, although undoubtedly lengthy, provides him with a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' (*Graham*, 560 U.S. at p. ___ [130 S.Ct. at p. 2030].)
>
> (*Caballero, supra,* 55 Cal.4th at p. 294 (conc. opn. of Werdegar, J.).)

deserving of the most severe punishments'" (*Miller*, at p. 2464). A 25 year to life sentence would probably satisfy these concerns. A 50 year to life sentence definitely would not.

CONCLUSION

For all of the foregoing reasons, we urge the Court to find sentences of 50 years to life and 58 years to life violate the Eighth Amendment for these offenders who were 16-years-old at the time of the offenses. By any measure, they fail to provide a meaningful opportunity to demonstrate the maturity and rehabilitation required to obtain release and reenter society as Graham and Miller require

February 15, 2017 Respectfully Submitted,

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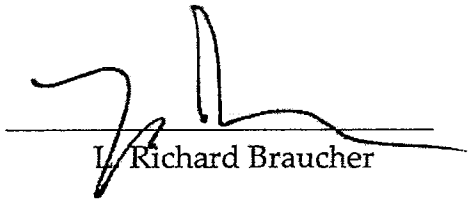
CERTIFICATE OF WORD COUNT

Counsel for amici hereby certifies that this brief consists of approximately 5,672 words, according to the word count of the computer word-processing program (excluding tables, proof of service, and this certificate).

February 15, 2017



L. Richard Braucher

Declaration of Service by Mail - Electronic Service by Email

People v. Contreras et al. Case No.: S224564

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in San Mateo County, California. My business address is 446 Old County Road, Suite 100 PMB 404, Pacifica, CA 94044. My electronic service address is emv_law@sbcglobal.net. On February 27, 2017, I served a true copy of the attached **APPLICATION OF AMICUS CURIAE PACIFIC JUVENILE DEFENDER CENTER FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS LEONEL CONTRERAS AND WILLIAM STEVEN RODRIGUEZ** on each of the following, by placing same in an envelope addressed as follows:

1. Tami Falkenstein Hennick, Office of the State Attorney General
   600 West Broadway, Suite 1800
   P.O. Box 85266, San Diego, CA 92186-5266
2. William Steven Rodriguez c/o Kessler & Seecof, LLP
   2254 Moore Street, Suite 201, San Diego, CA 92110

sealing and depositing each said envelope with the United States Postal Service at Pacifica, California, with postage thereon fully prepaid. On February 27, 2017, I transmitted a PDF version of this document by electronic mail to each of the following using the email address indicated:

1. Daniel J. Kessler (attorney for appellant Rodriguez) at: dan@bigbadlawyer.com
2. Nancy King, Esq. (attorney for appellant Contreras) at: njking51@gmail.com
3. Appellate Defenders, Inc. at: eservice-criminal@adi-sandiego.com.
4. Office of the San Diego District Attorney at: DA.Appellate@sdcda.org
5. The Office of the San Diego Public Defender at: ppd.eshare@sdcounty.ca.gov
6. Superior Court of San Diego, Hon. Peter C. Deddeh at:
   Appeals.Central@SDCourt.ca.gov
7. Leonel Contreras c/o Nancy King, Esq. at: njking51@gmail.com

The Application of the Amicus Curiae . . . and the Amicus Curiae 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. Executed on February 27, 2017, at Pacifica, California.

EILEEN ALISA MANNING-VILLAR
DECLARANT