IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

DEC 30 2014

Frank A. McGuire Clerk

Deputy

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TYRIS LAMAR FRANKLIN, Defendant and Appellant.	S217699 Court of Appeal No. A135607 (Contra Costa County Superior Court No. 51103019)

APPELLANT'S OPENING BRIEF ON THE MERITS

After Decision by the Court of Appeal
First Appellate District, Division Three
Filed February 28, 2014

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ISSUES PRESENTED FOR REVIEW

1. Did petitioner's sentence of 50 years to life for a homicide committed when he was a juvenile violate the Eighth Amendment?

2. Was the first issue rendered moot by enactment of Penal Code[1] section 3051?

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[1] Unless indicated otherwise, all future unassigned statutory references are to the Penal Code.

INTRODUCTION

While Tyris Franklin was tried and convicted of murder as an adult, he was only 16 years old at the time of the crime.[2]

The killing occurred minutes after Tyris learned that his 12-year old brother was assaulted by a group of older teenagers belonging to a local gang that had attacked Tyris and his family for a year prior to the killing. Tyris associated the victim Gene G. with that gang. When Tyris confronted Gene G. by asking "which one of you motherfuckers jumped my little brother? Gene G. replied "Fuck you and your little brother," which was hardly a denial that Gene was involved in the attack on Tyris's brother.

These were clearly mitigating circumstances. So was Tyris's age at the time of his crime (and the relevant mitigating factors of youth), and his lack of a significant prior criminal record or gang ties.

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[2] Because appellant was 16 years old at the time of the crime, and the victim and all key witnesses were also juveniles, appellant will refer to them by their first names. No disrespect is intended.

Yet, under the California sentencing scheme, Tyris's crime of conviction and the personal firearm discharge enhancement *mandated* his punishment to be 50 years to life (a sentence that is a functional equivalent of a life without parole sentence) *regardless* of the circumstances of the crime or the mitigating factors of youth discussed in recent decisions of the United States Supreme Court and this Court.

SUMMARY OF ARGUMENT

A. The 8th Amendment Violation

Under the recent line of authority decided by the United States Supreme Court and by this Court, Tyris's 50 years to life sentence violates the Eighth Amendment because it is a *de facto* life without parole sentence mandated by law, without allowing consideration of mitigating factors of youth. (*Miller v. Alabama* (2012) 132 S. Ct. 2455; *Graham v. Florida* (2009) 560 U.S. 48; *People v. Caballero* (2012) 55 Cal.4th 262; *People v. Gutierrez* (2014) 58 Cal.4th 1354.)

Simply put, these decisions stand for a proposition that Eighth Amendment requires that children be treated differently from adults for sentencing purposes. They are based on medical literature and social science research (as well as on common sense observations known to any parent), which identified certain mitigating factors of youth, including "transient rashness, proclivity for risk, and inability to assess consequences." (*Miller*, 132 S.Ct. at p. 2464, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 570.) These mitigating 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.)

Under the *Roper-Graham-Miller* line of precedent, imposition of death penalty for homicides committed as a juvenile is barred by the Eighth Amendment. Similarly, imposition of a life without parole sentence for a non-homicide crime committed before reaching age 18 is barred by the Eighth Amendment. Finally, imposition of a *mandatory* life without parole sentence for a homicide committed

before the age 18 is prohibited. Before such a sentence can be imposed, the sentencing court must be given discretion to consider imposing a lesser sentence in light of mitigating factors of youth, such as rashness, inability to consider risks and consequences of conduct, and penchant for risky behavior.

Decisions of this Court are in accord. In *Caballero*, this Court extended *Graham* and *Miller* to a term-of-years sentence that is a functional equivalent of life without parole sentence and imposed for a non-homicide crime. Then, most recently, in *Gutierrez*, this Court extended the holding of *Caballero* to bar imposition of a life without parole sentence for a homicide crime under a sentencing scheme, which created a presumption in favor of a life without parole sentence. Instead, the sentencing judge must be allowed to exercise individualized sentencing discretion using the *Miller* youth factors.

In light of the above-discussed authorities, a mandatory 50 years to life sentence imposed for a homicide committed as a juvenile violates the Eighth Amendment. Since Tyris's natural life

expectancy may well be 65 years or lower (when his race and the likely impact of incarceration is taken into account), Tyris will likely not live long enough to attend his first parole hearing. This places Tyris's sentence on equal footing with the term-of-years sentence found unconstitutional in *Caballero*, as well as lower court decision in *Mendez*, *Argeta*, and *Hernandez*.

But even if one ignores the likely impact of Tyris's race and incarceration on his expected life span and optimistically prognosticates that he can expect to life 72 to 76 years, Tyris's sentence is still a functional life without parole sentence. Under his sentence, Tyris will be incarcerated for a half a century before earning a shot at parole in his late 60's. In the best-case scenario, it would likely be a prison-to-nursing home type of a release. Tyris would never have had an opportunity to experience any substantial period of normal adult life in the community. Much like a sentence that is formally designated "life without parole," a sentence of 50 years to life "alters an offender's life by a forfeiture that is irrevocable."

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B. Recent Enactment of Section 3051 Does Not Moot the Eighth Amendment Violation

The enactment of the youth offender parole hearing does not remove life without parole sentences (or their functional equivalent) from the ambit of *Miller*'s Eighth Amendment concerns. As this Court has very recently held in *Gutierrez*, the *Miller-Graham* line of precedent requires a sentence that is constitutional at its inception. Using this rationale, *Gutierrez* rejected a mootness argument based on "after-the-fact corrective" statute (§ 1170, subd. (d)(2)) that is closely analogous to section 3051.

Like the statute invalidated in *Gutierrez*, section 3051 does not require the sentencing court to impose *at the outset* a sentence that provides a juvenile offender with a meaningful opportunity to obtain release. Instead, it merely creates *a possibility* of an administrative review process decades into the future. Said process does not justify imposition of a sentence that *Miller* held could be imposed on only those rare juvenile offenders found to be "irreparably corrupt." While the Court of Appeal in this case

reached a contrary conclusion, the appellate court did not have the benefit of *Gutierrez*.

STATEMENT OF THE CASE

A jury convicted appellant of first degree murder and made a true finding on a personal firearm discharge enhancement (§§ 187 and 12022.53, subd. (d)). (5 RT 1101; 2 CT 411-412.)

Appellant's sentence of 50 years to life was mandated by statute – 25 years to life on the murder count and the mandatory consecutive 25-to-life term for the use of a firearm, which caused death. (§§ 190, subd. (a), and 12022.53, subd. (d).) In imposing this sentence, the trial court stated that it was "the sentence that's prescribed by law, not one that the Court chooses." (5 RT 1127.)

In the Court of Appeal, appellant argued that his mandatory 50 years to life sentence violated *Miller* and *Graham* because the sentence was a de facto life without parole sentence and was imposed without consideration of the mitigating factors of youth set forth in *Miller* and *Graham*.

In a partially published opinion, the Court of Appeal affirmed the judgment and sentence. The appellate court assumed (without deciding) that appellant's 50-to-life sentence was a functional equivalent of a life without parole sentence, and that Tyris's sentence, when imposed, violated the Eighth Amendment. (*People v. Franklin* (2004) 224 Cal.App.4th 296, 375, rev. granted (S217699, June 11, 2014.) But the court also held that enactment of the youthful offender parole hearing system mooted the Eighth Amendment challenge to the sentence. (*Id.* at pp. 376-379.)

STATEMENT OF FACTS

A. Tyris's Background

Tyris Franklin was 16 years old at the time of the charged crimes. His mother raised a family, which, in addition to Tyris, includes four siblings. (3 RT 613-614; 5 RT 1121.)

At the time of sentencing, Tyris had completed eleventh grade. He was getting ready to take his GED test. Tyris was also interested in pursuing further education and / or enlisting in the United States Navy. (2 CT 543.)

In his leisure time, Tyris was interested in boxing and joined a Richmond Police Athletic League to pursue it; but it only lasted a couple of weeks. Tyris also used to play a flute. (2 CT 543.)

Prior to the charged crimes, Tyris had an insignificant record of juvenile adjudications. It consisted of three sustained juvenile delinquency petitions for misdemeanor resisting arrest and assault, in 2008 and 2010. Following the latest sustained petition, Tyris successfully committed a 90-day mandatory treatment program. At the time of the charged crimes, Tyris was on parole following completion of that program. (2 CT 545.)

At sentencing, Tyris apologized for what he had done:

> I do want to say I'm sorry, but sorry is a simple word, though. I didn't have no thoughts about killing him, you know. I don't know. It's hard to explain.
>
> But I do want to apologize to the family for taking your son, and I do want to apologize to my mother for taking me away from her and my family.
>
> I want to say sorry, but, like I said, sorry is... sorry can't explain the way I feel. Like you said you can't sleep at night. I can't sleep at night, either. I haven't been able to sleep at night for a lot of years now, you know.

> I'm not good with emotion, so I'm ... I really wish this didn't happen. I wish I could have found another way, but, like I said, I want to say sorry, but sorry is just – I don't know no other words to use. I don't know. I don't know. I'd like to say sorry to my mother, too. I would like to say sorry to each and every one of you all for what I did.

(5 RT 1126.)

B. Continuing Attacks on Tyris and His Family by the Victim's Gang Associates, Which Occurred During the Year Preceding the Homicide

Tyris had known the victim Gene G. for years. They were friends in middle school. (3 RT 617-618.) However, by January 2011 (about a year prior to the homicide), they were no longer friends. They had an altercation, during which Tyris was ready to fight, but Gene G. said "We don't fight no more. We shoot." (3 RT 618-620.)

Tyris associated Gene with a local gang called the Crescent Park gang or the Mini Mob.[3] Tyris had seen Gene together with the

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[3] While no evidence of existence of a formal gang by that name was presented at trial, appellant's online research shows that there is a Crescent Park gang embroiled in a gang war in Richmond, California. (http://richmondconfidential.org/2012/02/16/richmond-gang-detective-alleges-blacknell-built-reputation-for-violence) (as of Dec. 24, 2014.) According to a sworn testimony of a police detective in a criminal trial, this gang is one of the loosely knit local groups, which takes pride in their neighborhood or block and "is motivated

other members of this group. Gene's cell phone contains with Gene and several other members (including Kian W.) throwing gang signs. Tyris also thought Gene had shot up his house on a prior occasion. (3 RT 776.)

Crescent Park gang is a neighborhood gang, with which Tyris has had an ongoing conflict. Members of the gang shot up Tyris's house several times. (3 RT 752.) Two members of Tyris's family stood ready to testify at trial that during one of the incidents, threats were made and a weapon was brandished by a young man that could have been Gene G.[4] (3 RT 792-793.) Tyris's mother described these events at sentencing. (5 RT 1121.)

Several days prior to the killing, Kian W. (a member of the gang, and a friend of Gene G. who was on a photo in Gene's cell

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to gun violence by both a desire to build reputations and avenge the death of comrades."

[4]The trial court excluded this testimony under Evidence Code section 352. (4 RT 814-815.) In his appeal, appellant challenged this exclusion as a violation of state law and also the federal due process clause. Appellant has exhausted his state court remedies for the purpose of filing any federal habeas corpus petition challenging this ruling.

phone flashing gang signs) brandished a firearm at Tyris while they were both at school. (3 RT 624.) After this incident, Tyris's older brother Demond gave Tyris a loaded gun for protection. (3 RT 626-627.) Tyris made an unfortunate choice of taking the gun with him to school on the day of the killing. (3 RT 627, 646.)

C. The Homicide, Which Occurred Shortly After Tyris's 12-year Old Brother Was Assaulted By Several Older Crescent Park Gang Members

On the day of the homicide, Tyris was at a friend's house after school, when he got a phone call from his older brother Demond. While Tyris spoke to Demond, he looked somewhat angry, though he did not say why. (2 RT 314-317, 320.) After the phone call, Tyris recounted that Kian W. and some other teenagers from Crescent Park had just attacked Tyris's 12-year old brother and almost hit him with a car. The assailants said they were looking for Tyris. (3 RT 637.) Tyris was angry because the previous attacks on him and his family have now reached his 12-year old brother and he blamed himself for the attack. (3 RT 639-640.)

Tyris asked for a ride to the Crescent Park neighborhood. (2 RT 321-324.) Tyris wanted to go there because the Crescent Park gang was looking for him and he wanted to present himself, rather than wait for another attack. (3 RT 645-646.) Tyris was looking for the gang, not any specific person, and he did not plan to shoot anyone. But he did contemplate a possibility of having to use the gun. (3 RT 645-646, 648, 649, 650.)

Another friend (Jeanpierre Fordjour) gave Tyris, his friend Khalifa, and Jaswinder (an acquaintance) a ride to the Crescent Park neighborhood. The ride took about five minutes. There was no conversation during the ride, and music was playing. Tyris thought about what happened with his brother, and about the past attacks by the same gang. (3 RT 647.)

Tyris did not tell anyone in the car what he was thinking about; he was not crying or emotional. (3 RT 647-648.) According to Jaswinder (who did not know Tyris very well), Tyris's demeanor was "emotionless." But Tyris's friend Khalifa testified that Tyris

usually is a quiet guy and not particularly emotional. (2 RT 327, 349, 384, 407.)

Once the group arrived to the Crescent Park area, they saw the victim Gene G. walking down the street. They made a U-turn. Tyris asked Jeanpierre to unlock the door. Khalifa made a statement to the effect that Tyris did not need to "ride up" on Gene G. because Gene had nothing to do with this situation. Tyris's response may have been something like "I don't care. They beat up my brother" or "It doesn't matter. He is still from Crescent Park." (2 RT 330, 361, 386.) Tyris himself testified that he said "I don't care. They jumped my little brother." (3 RT 653.)

Jeanpierre stopped the car close to where Gene G. was walking. Several witnesses testified that Tyris pulled out a gun from his waistband when he got out of the car. (2 RT 363, 389, 421.) According to a witness who observed the events from a balcony across the street, Tyris walked around a parked car towards Gene, and, without saying anything, shot him several times. Neither Khalifa nor Jaswinder heard any conversation between Tyris and

Gene before shots were fired. (2 RT 275-277, 34; 4 RT 876-881.) However, Jeanpierre (who was in the same car as Khalifa and Jaswinder) told the police that shots were fired within seconds after Tyris yelled at Gene. (2 CT 539.)

Tyris himself testified that he did not pull out the gun until his conversation with Gene G. The gun was in his waistband when he got out, approached Gene G. and asked "Which one of you motherfuckers just jumped my little brother?" When Tyris approached Gene, Tyris did not know whether Gene was involved in the attack on his brother. (3 RT 718, 761-762.) Gene responded with "Fuck you and your little brother." Only then Tyris took out a gun and shot Gene G. (3 RT 656-657.)

D. The Investigation and the Trial

Richmond police arrested Tyris a couple of hours later. In his initial police interview, Tyris denied any involvement in the shooting, as well as being in Crescent Park that day. (2 RT 428; 4 RT 912, 917.)

At trial, the prosecutor extensively cross-examined Tyris regarding several unrelated prior school fights Tyris had with other students when he was in middle and in high school, including the fight on BART with Lisso G., another member of the Crescent Park gang. (3 RT 681-686, 744-746.)

Also, a BART police officer testified regarding the specific details of a fight between Tyris and Lisso G. The officer described an attack by four individuals, and Tyris as the primary aggressor. (4 RT 896-897.)

But Lisso himself testified for the defense and described a more pedestrian fight between adolescents, rather than an aggravated group assault suggested by the officer. (4 RT 944-946.) Lisso's account was much more consistent with the eventual resolution of this incident as a misdemeanor. (2 CT 561.)

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ARGUMENT

I.

Tyris's 50 Years to Life Sentence Violates the Eight Amendment Because It Is a Mandatory Functional Life Without Parole Sentence That Was Imposed on a Juvenile Offender Without Considering the *Miller-Graham* Youth Factors

A. Appellant's 50-to-Life Sentence In This Case Was Mandatory

There should be no reasonable debate that Tyris's 50-to-life sentence in this case was mandated by statute – 25 years to life on the murder count and the mandatory consecutive 25-to-life term for the use of a firearm, which caused death. (§§ 190, subd. (a), and 12022.53, subd. (d).) In imposing this sentence, the trial court stated that it was "the sentence that's prescribed by law, not one that the Court chooses." (5 RT 1127.)

It should be emphasized that the sentencing scheme before this Court is even more analogous to the sentencing scheme invalidated in *Miller*, than the scheme invalidated in *Gutierrez*.

In *Gutierrez*, juvenile defendants who committed special circumstances murder were sentenced to a life without parole

sentence under section 190.5, subdivision (b), which gave the sentencing judge discretion to sentence the defendant to a survivable 25-to-life term. What created an Eighth Amendment problem under *Miller* was then-existing judicial construction of section 190.5, subdivision (b), as creating *a presumption* in favor of a life without parole sentence. (*Gutierrez*, 58 Cal.4th at p. 1379 [creating a presumption in favor of life without parole sentences for 16 and 17-year olds is at odds with the holding of *Miller* that such sentences should be rarities].)

But in case like Tyris's, the sentencing judge has no discretion at all. When an offender commits first degree murder using a gun, the law mandates both the 25-to-life sentence for murder and a consecutive 25-to-life enhancement for the personal discharge of a weapon. Since section 12022.53, subdivision (h), prohibits striking of the enhancement under section 1385, subdivision (a), the judge in this situation has even less discretion than the circumscribed discretion held invalid in *Gutierrez* –i.e., he has no discretion at all to

impose anything less than 50 years to life. [5] This places the sentencing scheme at issue on equal footing with the Alabama and Arkansas sentencing schemes, which both mandated life without parole sentence based on the crime of conviction. (*Miller*, 132 S.Ct. at pp. 2461-2463.)

This also creates an anomaly between those defendants convicted of first degree murder with a gun and those who commit a first degree special circumstances murder. The latter category clearly involves a more grave crime; if an adult is convicted of such a crime, the only possible options would be the death penalty or a life without parole sentence. (§190.2, subd. (a).) Yet, in sentencing a juvenile defendant for this more grave crime, the sentencing court had discretion to sentence to a 25-to-life term even before *Gutierrez* remove a presumption in favor of a life without parole sentence.

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[5] Section 12022.53, subd. (h), provides:

Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.

In contrast, when a juvenile defendant commits a relatively less serious crime – a non-special circumstance first degree murder using a gun, the law precludes any sentence other than 50-to-life.

B. A Mandatory Sentence of Life Without Parole (Or Its Functional Equivalent) Violates the Eighth Amendment When Imposed for a Crime Committed by a Juvenile Offender

1. *Roper, Graham,* and *Miller*

Beginning with *Roper* and ending with *Miller,* the United States Supreme Court issued several decisions invalidating the harshest penalties for crimes the offender committed when he was a juvenile. These decisions stand for a proposition that the Eighth Amendment mandates that children must be treated differently than adults for sentencing purposes.

The Supreme Court based these decisions on a substantial body of medical and social science research, which shows fundamental differences between how adult and juvenile minds work. (*Miller,* 132 S.Ct. at p. 2646; *Graham,* 560 U.S. at p. 68.)

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For example, the *Graham* court relied on studies showing that

> 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.)

Similar concerns were echoed in an amicus brief filed in *Miller* by the American Medical Association and the American Academy of Child and Adolescent Psychiatry:

> 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.[6]

In *Roper*, the high court held the Eighth Amendment categorically bans capital punishment for crimes committed before the age of 18.

Several years later, in *Graham*, the Supreme Court extended the categorical ban to sentence of life without the possibility of parole. *Graham* held that the Eighth Amendment categorically prohibits the imposition of a life without parole sentence on a juvenile offender for a non-homicide offence. (*Graham*, 560 U.S. at p. 74.) Citing the observations in *Roper* concerning the lesser culpability of juveniles and their greater capacity for rehabilitation, the high court found them to be less deserving of the punishment

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[6] The full text of this brief can be located at http://fairsentencingofyouth.org/wp-content/uploads/2013/01/ac-10-9646-10-9647-Brief-for-the-American-Medical-Association-et-al.pdf (as of Dec. 25, 2014).

that "is the second most severe penalty permitted by law." (*Id.* at p. 69.)

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.)

Next, *Miller* extended to homicide cases *Graham*'s conclusion that a life-without-parole sentence imposed on a child may violate the Eighth Amendment. While *Graham's* categorical ban on life without parole sentences for juveniles only applies to non-homicide offenses, 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 taking into account 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*

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, *Caballero* rejected the Attorney General's narrow interpretation of *Graham*'s as

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

Although *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.)

Then, most recently, in *Gutierrez*, 58 Cal.4th 1354, this Court 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.)

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C. A Sentence of 50 Years to Life in Prison is a Functional Life Without Parole Sentence Because It Provides No More Than an Opportunity to Obtain a Prison-to-Nursing Home Release

1. Under *Miller* and *Graham*, a sentence that "alter[s] an offender's life by forfeiture that is irrevocable" does not provide a meaningful opportunity to obtain release

While the Supreme Court never expressly outlined the factors, in light of which a sentence requires an individualized sentencing hearing under *Miller*, the concerns that animated both *Graham* and *Miller* are instructive.

What led *Graham* to categorically ban life without parole sentences and *Miller* to prohibit mandatory imposition of such sentences 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 in

Rummel provided for possibility of parole after twelve years. (*Graham*, 560 U.S. at p. 70.)

Graham also held that imposition of such a sentence is especially harsh on a 16 or a 17-year old because such an offender "will on average serve more years and a greater percentage of his life in prison than adult offender." (*Graham*, 650 U.S. at p. 70.)

All of the above could be fairly said about a 50-to-life sentence imposed on 16 or a 17-year old. Even if the offender survives to his first parole hearing and is granted parole at that first hearing, he or she would have spent all of their adult life behind bars. The offender would never experience any substantial period of a normal adult life in the community, like holding a job or raising a family. Such a sentence alters the offender's life by irrevocable forfeiture and is, thus, practically indistinguishable from a sentence that is explicitly "without parole."

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2. A 50 years to life sentence is closely analogous to those California decisions finding a lengthy term of years sentence to be a de facto life without parole sentence

In *Caballero*, this Court first grappled with application of *Graham* and *Miller* to a sentence, which is not explicitly designated "without parole," but which is a functional equivalent because the defendant did would not become eligible for parole unless he lived to be 110 years old. *Caballero* held that such a sentence violated the Eighth Amendment because the defendant's first parole eligibility fell outside the defendant's natural life expectancy. (*Caballero*, 55 Cal.4th at p. 268.)

In a footnote, *Caballero* made a dictum observation that "natural life expectancy" is "the normal life expectancy of a healthy person of defendant's age and gender living in the United States." (*Id.* at p. 267, fn. 4.) Also, given the nature of the term of years sentence at issue (110 years to life), *Caballero* had no occasion to decide whether there is any impediment to extending the protection of an individualized *Miller-Graham* sentencing in cases where the

expected first parole opportunity comes at, or a few years prior to, the offender's natural life expectancy.

In addition, application of *Graham* and / or *Miller* to lengthy term-of-years sentences was addressed in four published California decisions. At the one end of the spectrum are *Hernandez, Argeta,* and *Mendez.* In *People v. Mendez* (2010) 188 Cal.App.4th 47, the court of appeal found that an 84-to-life sentence imposed on the defendant for a series of crimes committed when he was 16 violated the Eighth Amendment. *Mendez* reasoned that since the natural life expectancy for an 18-year old American man is 76 years, and Mendez would first become eligible for parole at age 88, his sentence was materially indistinguishable from a life without parole sentence. (*Id.* at p. 63.)

Then, in *People v. Argeta* (2012) 210 Cal.App.4th 1478, the court of appeal reached a similar conclusion regarding a 75 years to life sentence imposed on a 15-year old for committing a homicide. (*Argeta,* 210 Cal.App.4th. at p. 1482.) *Argeta* reasoned that because the minimum parole eligibility term will likely require that the defendant will be in prison for the rest of his life, the sentence was a

functional equivalent of an LWOP sentence, and resentencing in light of *Miller* and *Caballero* was required. (*Id.*)

Finally, most recently, in *People v. Hernandez* (2014) _ Cal.App.4th _, 2014 WL 7006923, the court held that a juvenile defendant who received a 61 years-to-life sentence, would be eligible for parole at 77, and had a natural expectancy of 77 to 79 years, did not have a meaningful opportunity for release within his expected lifetime. *Hernandez* calculated the natural life expectancy using the tables that took both gender and ethnicity into account.

At the other end of the spectrum is *People v. Perez* (2013) 214 Cal.App.4th 49. In *Perez*, a defendant was convicted of a series of offences committed when he was 16 and received a sentence of 30 years to life in prison. *Perez* held that neither *Miller Graham* nor *Caballero* would apply because the defendant will be 47 years old when he becomes eligible for parole. (*Perez*, 214 Cal.App.4th at p. 57-58.) As a result, the defendant was left with "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

The 50 years to life in prison sentence at issue here is in between the extreme ends of the spectrum, but much closer to *Hernandez, Argeta,* and *Mendez.* What Tyris's sentence shares in common with those sentences is that it requires a juvenile offender to spend all (or nearly all) of his adult life behind bars before getting an initial opportunity for parole. Given Tyris's race and the likely impact of incarceration, his expected life span may well be shorter than the minimum term he has to serve before being eligible for parole. But even if Tyris survives long enough to attend that hearing and obtain release in his late 60's, he or she would never experience any meaningful period of normal adult life in the community and all of the things that are associated with it.

In contrast, the 30-to-life sentence at issue in *Perez* provides an opportunity for release in one's 40's, which means that the offender would have a reasonable prospect to experience normal adult life while he is still a relatively young person.

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3. Persuasive authority from other states

Appellant's research uncovered several published decisions from other jurisdictions that persuasively address the issue of whether a 50 years to life sentence is a de facto life without parole sentence.[7] (*State v. Null* (Iowa 2013) 836 N.W.2d 41; *Bear Cloud v. State* (Wyo. 2014) 334 P.3d 132; *State v. Mason* (La.App. 2012) 86 So.3d 662.)

In *Null*, the defendant was convicted of murder he committed when he was almost 17 years old. (*Null*, 836 N.W.2d at p. 45.) He received a sentence, at which his first parole eligibility would occur when he is 69 years old (after 52.5 years). (*Ibid.*) The Iowa Supreme 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 that Null's prison term is beyond his life expectancy; his sentence may 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

[7] But see *Angel v. Commonwealth* (Va.App. 2011) 281 Va.248, and *Thomas v. State* (Fla. App. 2011) 78 So.3d 644.

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.*)

Very recently, Supreme Court of Wyoming followed *Null* to find that a sentence a 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* 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*, 86 So.3d 662, an intermediate appellate court Louisiana considered the validity of the trial court attempt to implement *Graham* by modifying the defendant's life sentence for a non-homicide crime 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*. (Slip Opinion at p. 7.)

4. A sentence of 50 years to life is a functional equivalent of life without parole sentence

In light of *Miller, Graham, Caballero,* and *Gutierrez,* as well as intermediate appellate court decisions from California and *Null, Bear Cloud,* and *Mason* decisions from other states, this Court should find

that any sentence for a homicide committed by a juvenile, under which the offender must serve a lengthy term of years sentence before earning a first shot at parole, requires an individualized hearing under *Miller*. Appellant recognizes that the term "lengthy" is ambiguous and may require this Court to draw an arbitrary line at some length of the sentence. But wherever that line is ultimately drawn, it is clear that a 50-to-life sentence is a de facto life without parole sentence. [8]

This approach finds ample support in *Miller* and *Graham*. One of the main concerns that animated those decisions were that much like the death penalty, a life without parole sentence "alters the offender's life by a forfeiture that is irrevocable." (*Graham*, 560 U.S. at p. 70 [contrasting a life without parole sentence with the sentence

[8] The same conclusion may be fairly drawn about any term-of-years sentence for a juvenile offender, which requires incarceration for more than 25 years before a first parole hearing. It is significant that under section 3051, the longest period of incarceration a youthful offender must serve before a first parole hearing is 25 years. Although this statute is not sufficient to moot the Eighth Amendment violation, it is nevertheless evidence of a legislative judgment that to provide a meaningful opportunity to obtain release through demonstration of rehabilitation and maturation, a first parole hearing must occur no later than 25th year of incarceration.

in *Rummel*, which provides for parole eligibility after 12 years of incarceration].) Such a sentence also means a denial of hope, that the offender's rehabilitative efforts will have no measurable impact on his opportunity to be released.

It is difficult to dispute that a sentence that requires an offender to spend half a century in prison before earning his first shot at parole fairly close to age 70 "alters the offender's life by forfeiture." A person who is incarcerated from his late teens into his late sixties, even if released on parole after the first eligibility hearing, will not have an opportunity to experience any substantial period of normal adult life in the community – having a job or raising a family. As a practical matter, such a person would have spend all (or nearly all) of his adult life behind bars. Such a sentence is not functionally distinguishable from a sentence that is expressly designated as "life without parole" sentence.

Moreover, because such a sentence offers a youthful offender not 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.)

Also, this approach would allow the courts not to engage in speculation regarding expected or likely mortality dates. Turning the inquiry regarding meaningful opportunity to obtain parole into an actuarial analysis misses the rationale of *Graham* and *Miller* -- that a life without parole sentence "alters the offender's life by forfeiture that is irrevocable," and does not provide the offender any hope that his rehabilitation and character improvement would alter the fact that he would spend the rest of his days behind bars.

When viewed through the prism of that rationale, it would not much matter whether an offender gets a first shot at parole at the time of his life expectancy, or shortly prior to that date. For example, even if actuarial measures could somehow reliably predict natural life expectancy to a specific day, no one would seriously argue that setting a parole date a day, a week, or even one year earlier would amount to a "meaningful" opportunity to obtain release through rehabilitation and maturity. That is so because all of

those scenarios still amount to a prison-to-nursing home release, in which an offender would never experience any substantial period of normal adult life in the community. (*Graham*, 560 U.S. at p. 71.)

Accordingly, this Court must find that a sentence of 50 years to life in prison is a de facto life without parole sentence, which cannot be imposed without an individualized sentencing hearing under *Miller* and *Graham*.

D. Tyris's Mandatory Sentence of 50 Years to Life in Prison Violates *Miller* and *Graham*

1. Tyris's life expectancy based on the year of birth and gender is 72 to 76 years; it drops to 64.9 years when his race is taken into account

Caballero dictum suggests that the term "natural life expectancy" in this context is the "normal life expectancy of a healthy person of the defendant's age and gender living in the United States." (*Caballero*, 55 Cal.4th at p. 267, fn. 3.) Using that standard, Tyris's natural life expectancy is between 72.4 and 76 years. (Compare *Mendez*, 188 Cal.App.4th at p. 63, citing National Center for Health Statistics [life expectancy for 18-year old man is 76

years] with Centers for Disease Control and Prevention, Health, United States 2011, tab. 22; (http://www.cdc.gov/nchs/data/hus/2011/022.pdf)(as of Nov. 28, 2014) [72.4 year life expectancy for men born in 1994).

However, if Tyris's race – African American – is taken into account, the lower end of the life expectancy range drops to 65 years. (http://www.cdc.gov/nchs/data/hus/2011/022.pdf) (as of Nov. 28, 2014).

Although dictum in *Caballero* defines "life expectancy" in terms of the defendant's age and gender (55 Cal.4th at p. 267, fn. 3), if actuarial analysis plays any role in determining what constitutes a functional life without parole sentence, there is no legal or logical reason to consider the offender's gender, but not his race. Taking race into account would merely recognize what is already reflected in the actuarial tables – that one's life expectancy varies significantly

by race. For example, a white man born in 1994 (the year Tyris was born) can expect to live to 73.3 years, while a black man only to 64.9.[9]

Consideration of race in this context is also appropriate because resolution of the issues before the Court is likely to impact a great number of African-American defendants. For instance, FBI crime statistics for 2011 (the latest such report available) show that for the murder offenders whose race is known, 52.4 percent were black.[10] A sentencing remedy that complies with the Eighth Amendment cannot ignore the reality of who is actually being sentenced.

2. This Court Should Consider the Very Likely Impact of Incarceration on Lowering Tyris's Natural Life Expectancy

In determining Tyris's life expectancy for the purpose of the cruel and unusual punishment analysis, this Court should also

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[9] (http://www.cdc.gov/nchs/data/hus/2011/022.pdf) (as of Dec. 26, 2014).

[10] http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/offenses-known-to-law-enforcement/expanded/expanded-homicide-data (as of Dec. 26, 2014).

require sentencing courts to take into account the likely impact of incarceration on the natural life expectancy.

Null recognized that "long-term incarceration [may present] health and safety risks that tend to decrease life expectancy as compared to the general population." (*Null*, 836 N.W.2d at p. 71; see also *Bear Cloud* 334 P.3d at p. 142 [recognizing that data presented by the Tyris seems to demonstrate that the life expectancy of incarcerated youthful offenders is significantly reduced compared to that of the general population]; *United States v. Taveras* (E.D.N.Y. 2006) 436 F.Supp.2d 493, 500 [life expectancy within federal prison is considerably shortened]; see also The Commission on Safety and Abuse in America's Prisons, Confronting Confinement (June 2006) p. 11 [discussing persistent problems in U.S. penitentiaries of "prisoner rape, gang violence, the use of excessive force by officers, [and] contagious diseases"] (http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf) (as of Nov. 28, 2014).)

The most recent statistical information regarding the impact of incarceration in California prisons on a person's life expectancy is alarming. In 2012, the average age at which a California inmate died was 55 years of age; if suicide, homicide, and drug overdose cases are excluded, the average age at the time of death goes up to only 57 years. (See Analysis 2012 Inmate Death Reviews in the California Prison Healthcare System, Table 2, page 7, Kent Imai, M.D., consultant to the California Prison Receivership (http://www.cphcs.ca.gov/docs/resources/OTRES_DeathReviewAnalysisYear2012_20130808.pdf) (as of Dec. 27, 2014) ["the average inmate life expectancy of 55 is some twenty years younger than that of the average American male, reflecting the higher prevalence of addiction to drugs and tobacco, chronic hepatitis C infection, depression and other severe mental illness, and other social, racial, and economic factors"]; see also *Brown v. Plata* (2011) 131 S.Ct. 1910, 1925-1926 & fns. 3 and 4 [discussing "severely deficient care" in California's prisons and noting testimony that "extreme departures" from the standard of care are "widespread" and that the proportion

of "possibly preventable or preventable" deaths was extremely high"].)

3. Since Tyris's 50 years to life sentence is mandatory, the sentencing court was prevented from considering the mitigating circumstances of his case, as well as the youth factors set forth in *Miller* and *Graham*

Under the approach set forth in *Null* and *Bear Cloud*, Tyris's mandatory 50-to-life sentence is a functional equivalent of a life without parole sentence, which cannot be imposed absent an individualized sentencing hearing under *Miller*.

Tyris was sentenced in 2012 to a sentence of 50 years to life. After spending half a century behind bars, he will first become eligible for parole only when he is several months older than 66 years of age. (2 CT 541.) *In the best case scenario* (i.e., one that assumes that Tyris's life expectancy isn't affected by incarceration or his race), Tyris would have between four and nine years of life expectancy left.

Mandatory imposition of a sentence of this nature does not comply with the dictates of *Graham* and *Miller* that those convicted

of homicide crimes committed as juveniles do not receive a mandatory life without parole sentence. The sentence effectively takes Tyris's life by irrevocable forfeiture, as he would never experience any substantial period of normal adult life in the community. His sentence provides merely a chance for a geriatric release, which means a sentence that denies any hope his rehabilitative efforts could create an opportunity to demonstrate fitness for release into society while he still has meaningful life expectancy left. (*Graham*, 560 U.S. at p. 70.) It also undermines the core teachings of *Graham*, *Miller*, and *Caballero* that except for a rare case of a truly irredeemable offender, the sentencing court should not make a judgment at the outset that a juvenile offender will never be deemed fit to rejoin society. (*Graham*, 560 U.S. at p. 74; *Caballero*, 55 Cal.4th at p. 268.)

Moreover, if this Court considers the likely impact of incarceration, as well as Tyris's race, into account in determining his life expectancy, there is a strong likelihood that Tyris will never live long enough to attend his first parole hearing. This places Tyris's

50-to-life sentence in the same category as the sentences held unconstitutional in *Caballero, Hernandez, Mendez,* and *Argeta.*

Finally, because Tyris's 50 years to life sentence was mandated by law, the sentencing court never got an opportunity to consider whether this de facto life without parole sentence for a crime committed by a 16-year old was warranted in light of the mitigating circumstances of the killing (including the repeated attacks by the Crescent Park gang on Tyris's family that culminated in assault by several older teenagers on Tyris's 12-year old brother), Tyris's lack of significant prior criminal record, his difficult upbringing, lack of gang ties, and other relevant mitigating factors of youth identified in *Miller* and *Graham.*

Therefore, Tyris's mandatory sentence of 50 years to life is a functional life without parole sentence, which violates *Miller, Graham, Caballero,* and *Gutierrez.*

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E. To Remedy the Eighth Amendment Violation, Penal Code Section 12022.53, Subd. (h), Must Be Judicially Reformed to Give Sentencing Courts Discretion to Strike the Firearm Enhancement and Impose a Non-LWOP 25 Years to Life Term for Committing First Degree Murder With a Firearm

If this Court agrees with Tyris's position that the 50 years to life sentence is an unconstitutional mandatory functional life without parole sentence, the issue before the Court will be how to remedy the violation.

A constitutional conflict is created by the fact that section 12022.53, subdivision (h), contains an explicit prohibition on striking the 25-to-life enhancement under section 1385, subdivision (a). (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1363 [where § 120222.53, subd. (d), applies, "it leaves the trial court no discretion to modify the punishment prescribed"].) Accordingly, unlike section 190.5 at issue in *Gutierrez*, given section 12022.53, subdivision (h)'s, clear language that is not susceptible to differed interpretations, the Court cannot simply adopt an interpretation of section 12022.53(h) that does not conflict with *Miller*.

However, as this Court recognized in *People v. Sandoval* (2007) 41 Cal.4th 825, at page 844, the Court has the authority to reform the statute to confine its reach to constitutional limits. Reformation can take a form of placing a "saving construction" on the statutory language (thereby limiting its reach to constitutional limits) or disregarding statutory language and substituting reform language. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 545.)

For example, in *People v. Roder*, this Court reformed an unconstitutional presumption created by section 496 into a constitutionally permissible legislative prescribed permissive inference, instead of striking the presumption outright. (*People v. Roder* (1983) 33 Cal.3d 491, 505; accord *Sandoval*, 41 Cal.4th at, fn. 7; see also *People v. Castello* (1998) 65 Cal.App.4th 1242, 1250 & fn. 8 [to the extent Code of Civil Procedure section 1008 has any applicability to criminal cases, it can be reformed to impose only directory limitations on the court's power to reconsider its own interim rulings in criminal cases].

Here, as well, judicial reformation of section 12022.53, subdivision (h), would avoid a constitutional conflict with *Graham*, *Miller*, *Caballero*, and *Gutierrez*. This Court has the authority to construe the prohibition on striking section 12022.53 enhancements as inapplicable to cases involving juvenile offenders, in which imposition of the enhancement would result in a functional life without parole sentence. Instead, in those cases, the sentencing court would have the discretion to strike section 12022.53, subdivision (d), enhancement, in order to impose a non-functional life without parole sentence.

Such reformation would be completely consistent with legislative intent. Although (as will be explained in Argument II) section 3051 does not moot the Eighth Amendment violation, it does reflect legislative judgment that those convicted of crimes committed as juveniles should have their first parole hearing no later than 25 years after the date of sentencing. The proposed judicial reformation of section 12022.53, subdivision (h), would give sentencing courts discretion to impose sentences consistent with that

legislative intent. This Court can confidently conclude that the Legislature would have preferred this reformation to an outright repeal of section 12022.53, subdivision (h). (*Kopp*, 11 Cal.4th at p. 670.)

II.

Enactment of the Penal Code § 3051 Does Not Moot the Eighth Amendment Violation In This Case

A. Introduction

The Court of Appeals found that even if Tyris's 50 years to life sentence violates *Miller* and *Graham*, the violation was mooted by the recent passage of section 3051 (and other statutes comprising the new youthful offender parole system). However, the Court of Appeal (which had decided this issue without the benefit of this Court's opinion in *Gutierrez*), was mistaken.

Much like the section 1170, subdivision (d)(2), procedure, held invalid in *Gutierrez*, and contrary to *Miller* and *Graham*, section 3051 does not require discretionary consideration *by the sentencing court at the time of original sentencing* regarding when a youthful offender

would first have an opportunity to demonstrate suitability for release.

Instead, section 3051 defers resolution of that issue for 25 years (assuming the youthful parole offender hearing system is not repealed by the Legislature or the electorate). This is not only contrary to what *Miller* and *Graham* require, but it also fails to provide a mechanism for reliable and timely evaluation of the youth factors set forth in *Miller* and *Graham*. Given the passage of time, many of the factors will be nearly impossible to evaluate.

B. Section 3051

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 hearings in the 15th, 20th, or 25th year of the offender's incarceration. (§ 3051, subd. (b)(1).) For individuals like Tyris, who received a base term of 25

years to life, the youthful parole hearing must occur in the 25th year of incarceration.[11] (§ 3051, subd. (b)(3).)

In conducting youthful offender parole hearings, the Board is required to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

If a youthful offender is deemed suitable for parole at his first eligibility hearing, he shall be paroled notwithstanding the fact that he has not yet served the minimum imprisonment term of his original sentence. This is accomplished by creating a specific exception to the existing statutory requirement that no prisoner serving a life sentence may be paroled until he serves the greater of seven (7) calendar years or a minimum period of confinement

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[11] Tyris's 50-to-life sentence consists of 25 to life on the first degree murder charge, and 25-to-life on the firearm use enhancement under § 12022.53, subd. (d).) As the Court of Appeal correctly found, because the longest term of imprisonment is 25-to-life, he is first eligible for a youthful offender parole hearing after 25 years. (*Franklin*, 224 Cal.App.4th at p. 376, fn. 6)

required by statute for his crime of conviction. (§ 3046, subds. (a), (b), and (c).)

If a youthful offender is not granted parole at the first hearing, the Board shall set a subsequent parole hearing date 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, subds. (b)(3) and (4).)

C. The Court of Appeal's Decision

The Court of Appeal agreed with the Attorney General's argument that enactment of SB No. 260 mooted Tyris's Eighth Amendment argument under *Miller*. The court refused to read *Miller* and *Graham* as requiring the sentencing judge to make an initial determination at the time of sentencing as to when a particular juvenile offender should become eligible for parole. (*Franklin*, 224 Cal.App.4th at pp. 375-379.) Instead, the Court of Appeal read *Graham*, *Miller*, and *Caballero* very narrowly as requiring only meaningful opportunity for parole sometime during the offender's life. (*Id.*) According to the appellate court, while

Tyris's initial sentence may be a functional LWOP sentence, section 3051 provides a meaningful opportunity for parole and Tyris's sentence is no longer a functional LWOP sentence. (*Franklin*, 224 Cal.App.4th at p. 378.)

D. Under the Holding and Rationale of *Gutierrez*, Section 3051 Does Not Moot the Eighth Amendment Violation

In *Gutierrez*, this Court held that in order to comply with *Miller*, sentencing courts must apply section 190.5, subdivision (b), without a presumption favoring a sentence of life without parole, and must consider the *Miller* youth factors to determine if a particular defendant is a rare juvenile offender "whose crime reflects irreparable corruption." (*Gutierrez*, 58 Cal.4th at pp. 1387-1388.)

In reaching that conclusion, *Gutierrez* rejected a similar mootness argument regarding section 1170, subdivision (d)(2). One of the issues before this Court in *Gutierrez* was whether recent enactment of section 1170, subdivision (d)(2), mooted the defendant's argument that his mandatory LWOP sentence for a special circumstances murder he committed before the age of 18

violated *Miller*. (*Gutierrez*, 58 Cal.4th at p. 1360.) Section 1170, subdivision (d)(2), was enacted in response to *Graham*. Under that statute, when a defendant received an LWOP sentence for a crime he committed as a juvenile, after serving at least 15 years, he could petition the trial court three times to recall his sentence.

Gutierrez rejected the Attorney General's argument that section 1170, subdivision (d)(2), mooted the defendant's *Miller* claim. The Court reasoned existence of a potential mechanism for resentencing after 15 to 24 years does not meant that "the initial sentence is thus no longer effectively a sentence of life without the possibility of parole." (*Gutierrez*, 58 Cal.4th at p. 1386.) The Court pointed out that the initial sentence of life without parole remains fully effective after the enactment of section 1170, subdivision (d)(2). (*Id.* at p. 1386.) But *Graham's* requirement of providing a meaningful opportunity to obtain release is "a constitutionally required alternative to – not [an] after-the-fact corrective for – *making the judgment at the outset* that those offenders never will be fit to reenter society." (*Ibid.*) A mere possibility of an opportunity to petition for

recall an unconstitutional sentence 15 to 24 years into the future did not make more reliable or justifiable the imposition of life without parole sentence and its underlying judgment that the offender is beyond redemption. (*Ibid*; *Graham*, 560 U.S. at p. 75.)

Gutierrez should control in this case. While section 3051 works somewhat differently than section 1170, subdivision (d)(2), those differences are immaterial. Much like the statute at issue in *Gutierrez*, section 3051 does not require a sentencing court to exercise discretion at the time of the original sentence. Instead, any possible consideration of amenability for a parole date is deferred for decades (15 years in the case of § 1170, subd. (d)(2); 25 years in the case of § 3051).

This is contrary to *Graham*, *Miller*, *Caballero*, and *Gutierrez*, which all require a constitutional sentence be imposed *at the time of original sentencing*. (*Gutierrez*, 58 Cal.4th at p. 1386; see also *Miller*, 132 S. Ct. at p. 2469; *Graham*, 560 U.S. at p. 75; *Caballero*, 55 Cal.4th at p. 268.) Even if it turns out that the State's implicit judgment that Tyris was irreparably corrupt was later corroborated by improper

prison behavior or failure to mature, Tyris's sentence would still be disproportionate because that judgment was made at the outset. (*Graham*, 560 U.S. at p. 73; *Gutierrez*, 58 Cal.4th at p. 1386.) A parole hearing in 25 years cannot make Tyris's functional life without parole sentence "any more valid when it was imposed." (*Gutierrez*, 58 Cal.4th at p. 1386.)

Furthermore, to the extent differences between sections 1170, subdivision (d)(2), and 3051, are material, section 3051 still fails to comply with *Miller*. First, as previously noted, this scheme does not require the sentencing court to consider the *Miller-Graham* youth factors at the time of the sentencing hearing. The scheme leaves the unconstitutional sentence fully intact.

Second, because the youthful offender parole hearing system is completely administrative, no judicial officer would ever apply the *Miller* factors. Instead, these factors would only be applied by the Board. Board Commissioners are not judges or even necessarily

attorneys.[12] (§ 4801, subd. (c); see also §§ 5075 and 5075.6, subd. (a)(1) [establishing qualifications to be a Board commissioner].)

Third, youthful offender parole system is even more problematic than section 1170, subdivision (d)(2), because under section 3051, consideration of *Miller* youth factors is pushed even further into the future. Section 1170, subdivision (d)(2), created the first opportunity to petition for a sentence recall after 15 years. In contrast, under section 3051, the first consideration of the *Miller* factors would not occur until after 25 years after the sentencing hearing.

This delay completely undermines the evaluation of the youth factors set forth in *Miller* and *Graham*. For example, under the youthful offender parole hearing system (assuming it is still intact), Tyris would first come up for parole in his early 40's. At that point, there would be no reliable way to measure his cognitive abilities, maturity, and other youth factors when the offence was committed

[12] More than half of the current Board members are not attorneys. (http://www.cdcr.ca.gov/BOPH/commissioners.html) (as of Dec. 27, 2014).

25 years prior. Nor would there be a way to measure the progress made in those areas during the 25 years of incarceration.

Similarly, it would be nearly impossible to reconstruct factors, such as family background, home or school environment, or other similar circumstances. In 25 years, witness memories will invariably fade. In many cases, key witnesses (such as family members) have died or moved away and can no longer be located.

Accordingly, section 3051 does not moot the Eighth Amendment violation in this case.

CONCLUSION

Based on the foregoing, this Court should hold that:

(1) Appellant's sentence of 50 years to life for a homicide committed when he was a juvenile violates the Eighth Amendment;

(2) The Eighth Amendment violation in this case was not rendered moot by enactment of section 3051.

DATE: By: _____

Gene D. Vorobyov
Attorney for Appellant
TYRIS L. FRANKLIN

CERTIFICATE OF WORD COUNT

I certify that this brief consists of 10,174 words (including footnotes, but excluding this certificate, proof of service, and tables), as indicated by the Microsoft Word program in which the brief is prepared.

DATE: December 30, 2014 By: _____

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PROOF OF SERVICE

I declare that I am an active member of the California bar, over the age of 18, not a party to this action and my business address is PMB 733, 5214F Diamond Heights Blvd, San Francisco, CA 94131. On the date shown below, I served the within APPELLANT'S OPENING BRIEF ON THE MERITS to the following parties hereinafter named by:

X E-serving the following parties at the following e-mail addresses:

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X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct.

Executed on December 30, 2014, at San Francisco, California.

/s/ Gene D. Vorobyov