IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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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 REPLY BRIEF ON THE MERITS

After Decision by the Court of Appeal
First Appellate District, Division Three
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GENE D. VOROBYOV, California Bar No. 200193
LAW OFFICE OF GENE VOROBYOV
450 Taraval Street, # 112
San Francisco, CA 94116
Telephone: (415) 425-2693; gene.law@gmail.com

Attorney for Appellant

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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?

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

INTRODUCTION

Appellant Tyris Franklin is serving a sentence of 50 years to life in prison for a murder he committed when he was 16. His sentence was mandatory, regardless of the circumstances of the crime or the mitigating factors of youth discussed in the *Roper*, *Miller*, and *Graham* decisions.

Here, while the killing took a life of another 16-year old, there were mitigating circumstances. At the time of the homicide, Tyris had no significant prior criminal record or gang ties. The killing occurred minutes after Tyris learned that his 12-year old brother was assaulted by a group of older teenagers who said they were looking for Tyris. The assailants belonged to a local street gang that had attacked Tyris and his family in the course of a preceding year. Tyris associated the victim Gene G. with the 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 could be construed as confirmation that Gene participated in the attack, or at least approved of it.

SUMMARY OF ARGUMENT

As to the Eighth Amendment violation, the crux of respondent's argument is that since Tyris's first parole opportunity would occur at some point before the *average* life expectancy of all U.S. men of Tyris's age, mandatory imposition of this sentence does not violate *Miller*, *Graham*, and *Caballero*.

But this Court never held that a sentence is a functional equivalent of a life without parole sentence *only* if the first parole date falls outside the average life expectancy for the offender's age and gender.

Furthermore, adopting such methodology would be contrary to *Graham* and *Miller* and would reasonably likely lead to unconstitutional sentences, especially for young men and minorities. Life expectancy tables only provide average estimates and are ill suited for sentencing, an inherently individualized determination. As stated in the opening brief, this Court should follow the Iowa and the Wyoming Supreme Courts and extend the protections of an

individualized *Miller* hearing to any lengthy term of years sentence imposed on a juvenile. (AOB 35-39.)

In terms of whether section 3051 moots the claim, respondent is not able to persuasively distinguish *People v. Guitierrez* (2014) 58 Cal.4th 1354. Much like the statute at issue in *Gutierrez*, section 3051 leaves the original unconstitutional sentence intact and defers consideration of the *Miller* factors decades into the future. *Gutierez* should control in this case and appellant's Eighth Amendment claim is not moot.

ARGUMENT IN REPLY

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. Introduction

In his opening brief, appellant Tyris Franklin explained why his mandatory 50 years to life sentence for a homicide he committed

when he was 16 violates the *Ropers-Graham-Miller* line of decisions.[2] These decisions stand for a proposition that the Eighth Amendment requires that children be treated differently than adults for sentencing purposes. These decisions rely on medical literature and social science research, which identify mitigating factors of youth that (1) lessen the child's moral culpability, and (2) increase the prospect that the child will neurologically develop and reform.[3] (AOB 3-4, 21-25; *Miller v. Alabama* (2012) 132 S.Ct. 2455, 2646; *Graham v. Florida* (20092) 560 U.S. 48, 68.)

While the Supreme Court does not require States to *guarantee* such juvenile offenders' freedom, the States must provide such child offenders "some meaningful opportunity to obtain release on demonstrated maturity and rehabilitation." (*Graham,* 560 U.S. at p. 75.) The reason for this requirement is that a sentence of life without

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[2] *Roper v. Simmons* (2005) 543 U.S. 551.

[3] These factors include "lack of maturity" and "underdeveloped sense of responsibility;" being more vulnerable or susceptible to negative influences and outside pressures; the character of a juvenile is not as well formed as that of an adult." (*Roper,* 543 U.S. at pp. 569-570; *Graham,* 560 U.S. at p. 68; *Miller,* 132 S. Ct. at 2475.)

parole (or its functional equivalent) "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, and no reason for hope." (*Id*; see also Cummings & Colling, The Is No Meaningful Opportunity In Meaningless Data: Why It Is Unconstitutional To Use Life Expectancy Tables in Post-Graham Sentences (2014) 18 U.C. Davis J. Juv. L & Pol'y 267, 274.) The Eighth Amendment forbids States from making the judgment at the outset that those offenders will never be fit to rejoin society.[4] (*Graham*, 560 U.S. at p. 75.)

All of the above can be fairly said about a 50 years to life sentence imposed on a 16 or a 17-year old, like Tyris Franklin. Even if a juvenile offender manages to survive for 50 years in prison to

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[4] *Miller* does not categorically forbid imposition of such a sentence on a juvenile convicted of a homicide offence in a rare case where the crime shows the juvenile to be "irreparably corrupt." However, *Miller* forbids imposition of a mandatory sentence of this nature, where the trial court has no discretion to consider the disabilities of youth and impose a sentence less than life in prison or its functional equivalent. (*Miller*, 132 S.Ct. at pp. 2465, 2466.) *Miller* further cautioned that cases where a life without parole sentence, or its functional equivalent, imposed on a juvenile for a homicide offence will be uncommon. (*Id.* at p. 2469.)

attend his first parole hearing at age 66 or 67, (which is far from certain, considering the likely impact of incarceration and race on how long a juvenile is expected to live in prison), he will have spent all of his adult life behind bars. He would never experience any substantial period of a normal adult life in the community, like holding a job or raising a family. A sentence of this nature provides only a mathematical possibility of a geriatric release. Thus, it alters one's life by irrevocable forfeiture and does not incentivize maturation and reform just as a sentence that is explicitly "without parole."[5] (AOB 27-28, 35-39; *People v. Caballero* (2012) 55 Cal.4th 262; *People v. Mendez* (2010) 188 Cal.App.4th 47; *People v. Argeta* (2012) 210 Cal.App.4th 1478; see also *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.)

[5] The opening brief on the merits also cited *People v. Hernandez*, 232 Cal.App.4th 278 (2014), which held that a juvenile defendant who received a 61-year to life sentence, would be eligible for parole at 77, and had a natural life expectancy of 77 to 79 years, did not have a meaningful opportunity to obtain release within his expected life time. Since the filing of the opening brief, this Court has granted review (S224383), pending disposition of this case, and *In re Alatriste* (S214652) and *In re Bonilla* (S214960).

The facts of this case aptly demonstrate this point. Even if one optimistically prognosticates that Tyris's life expectancy is 76 years (which is only an average estimate that fails to take into account the data concerning impact of race on life expectancy, and ignores the likely reduction of life expectancy from the impact of prolonged incarceration), Tyris's first opportunity for parole will come when he would have only a few years of life expectancy left. He would have aged 10 to 15 years more than his age-peers in the general population. While Tyris's sentence may provide a mathematical opportunity for release at, or near the time of death, it fails to provide a meaningful opportunity to obtain release within the meaning of *Graham* and *Miller*. (AOB 44-46.)

The proper remedy for this Eighth Amendment violation is to reform section 12022.53, subdivision (h), to give the sentencing court discretion to strike the 25-to-life firearm use enhancement in light of the *Miller* youth factors, and to impose a 25 years to life sentence for committing first degree murder with a firearm. (AOB 47-50; *People v. Sandoval* (2007) 41 Cal.4th 825; *People v. Roder* (1983) 33 Cal.3d 491.)

B. *Caballero*'s Does Not Limit Individualized *Miller* Sentencing Hearings to Cases Where First Parole Eligibility Falls Outside the Natural Life Expectancy

Respondent's argument that 50 years to life sentence is not functionally equivalent to life without parole sentence is premised on an incorrect assumption that for such equivalency, the offender's first parole eligibility must be scheduled to occur outside his natural life expectancy. (RB 23.)

But *Caballero* held no such thing. (AOB 29-30.) At issue in *Caballero* was whether a sentence of 110 years to life is a functional life without parole sentence for *Graham* purposes. (*Caballero*, 55 Cal.4th at p. 268.) Since Caballero's first opportunity for parole would occur 100 years later, this Court held that the sentence did not provide the defendant with "some realistic opportunity to obtain release from prison during his or her expected life time. (*Ibid.*)

But the court had no occasion, and did not actually decide whether there is any impediment to extending the protections of an individualized sentencing hearing to cases where the expected first parole opportunity would come at, or a few years prior to, the

offender's natural life expectancy. For similar reasons, *Caballero's* footnote observation concerning what constitutes "natural life expectancy" was dictum. (AOB 29; *Caballero*, 55 Cal.4th at p. 267, fn. 4.)

Similarly, California lower appellate court decisions have not read *Caballero* as narrowly as respondent advocates. Instead, a sentence of 50 years to life is analogous to the mandatory functional life without parole sentences invalidated in *Mendez* and *Argeta*. Given Tyris's race and the likely impact of prolonged incarceration on his health, he is not reasonably likely to survive long enough to attend his first parole hearing. But even if Tyris lives long enough to seek and obtain parole when he is 66 or 67, he would never experience any meaningful period of normal adult life in the community and all of the things that are associated with it. (AOB 29-32.) A sentence of this nature provides, at best, a prospect of a geriatric release, which does not provide a meaningful opportunity to obtain release within the meaning of *Graham* and *Miller*.

C. This Court Should Reject Respondent's Proposed Actuarial Analysis

1. Respondent's proposed methodology is contrary to *Graham* and *Miller*

To the extent respondent urges this Court to reduce the determination of whether a juvenile's sentence is a functional life without parole sentence to a simplistic comparison of the first expected parole eligibility with an actuarial table, this Court should decline the invitation. (AOB 35-39.)

Respondent's proposed method would require courts to engage in speculation regarding expected or likely mortality dates. But doing so completely misses the teaching of *Ropers, Graham,* and *Miller*. Children are different than adults for sentencing purposes because they are inherently less culpable and have greater capacity to rehabilitate. As a result, even when they commit homicide offences, except in rare cases, they should not receive a sentence that takes their life by forfeiture and does not provide any hope that rehabilitation would lead to a meaningful opportunity to obtain release and rejoin society.

As noted on pages 38 and 39 of the opening brief, given this rationale, even if actuarial measures could reliably predict natural life expectancy to a specific date, no one would serious argue that a parole date within a day, a month, or even a year of that date would amount to a "meaningful" opportunity to obtain release through rehabilitation and maturity. (*Graham*, 560 U.S. at p. 75.) In a case of someone serving 50 years to life sentence since they were 16 or 17, a release at 66 or 67 after half a century behind bars would still amount to a prison-to-nursing home release. (AOB 38-39; *Graham*, 560 U.S. at p. 71.)

Respondent disputes the above analysis, claiming that the term "meaningful opportunity to obtain release," as used in *Graham*, only requires that such an opportunity be given at some point within the offender's life. (RB 29.) But this is an unduly narrow reading of *Graham*.

Graham used the term "*meaningful* opportunity to obtain release based on maturity and rehabilitation," and criticized life without parole sentence for denying a juvenile offender the right to

reenter community, which signifies an irrevocable judgment about the offender's value and place in society. (*Graham,* 560 U.S. at pp. 74-75.) It would be untenable to conclude that a sentence requiring a juvenile offender to serve half a century behind bars before earning a first parole opportunity at the very end of his or her life (assuming that he even survives for that long) provides a "meaningful opportunity to obtain release" within the meaning of *Graham.* At best, this sentence creates a mathematical possibility of a geriatric release. Such a sentence denies hope of life outside prison walls and provides as little incentive for rehabilitation as a sentence that is explicitly "without parole."

2. Respondent's proposed actuarial analysis is contrary to the better reasoned published decisions from other jurisdictions

Respondent has not persuasively addressed the argument that this Court should follow well-reasoned published decisions form the Iowa and the Wyoming Supreme Courts, which extend the protections of an individualized *Miller* sentencing hearing to any lengthy term of years service imposed on a juvenile.

(*Null* , 836 N.W.2d 41; *Bear Cloud,* 334 P.3d 132; see also *Mason,* 86 So.3d 662.)

Instead, respondent cited several decisions, which find a sentence not be a functional life without parole sentence under *Miller* and *Graham* so long as the possibility of parole arises within the offender's average life expectancy. (RB 24-25.) Most of those cases are unpublished and / or from trial courts. *Thomas,* a case from a Florida intermediate appellate court, is published, but offers hardly any analysis in support of the determination that a 50-year determinate sentence is not a functional life without parole term. (*Thomas v. State* (Fla. App. 2011) 78 So.3d 644, 646-647.)

Angel, a case from Supreme Court of Virginia, is plainly inconsistent with this Court's recent decision in *People v. Gutierrez* (2014) 58 Cal.4th 1354. *Angel* held that that three consecutive life terms imposed on a juvenile for a series of non-homicide offences did not violate *Graham.* The *Angel* court reasoned that Virginia law provides "a meaningful opportunity to obtain release" by allowing a prisoner who has reached the age of sixty and has served at least 10

years of his or her sentence to petition for a conditional release. (*Angel v. Commonwealth* (Va. 2011) 704 S.E.2d 386, 402.)

However, in *Gutierrez*, this Court held that a sentence of life without parole does not provide a meaningful opportunity to obtain release despite a recent enactment of a statute that permitted the juvenile offender to petition for recall of his sentence after serving 15 years. (*Gutierrez*, 58 Cal.4th at pp. 1360, 1386.)

Finally, to the extent the remaining cases cited by respondent stand for a proposition that a sentence is not functionally life without parole so long as it provides for an opportunity for parole at *some* point during the juvenile offender's average life expectancy, this Court should decline to follow them. A simplistic comparison of anticipated parole eligibility date with anticipated average life expectancy is contrary to *Graham* and *Miller*. (AOB 35-39; *Null*, 836 N.W.2d 41; *Bear Cloud*, 332 P.3d 132; *Mason*, 86 So.3d 662.)

Also, as explained next, this approach tends to overestimate the natural life expectancy, and, thus, result in an unconstitutional

sentence, in which a juvenile offender will likely die in prison before getting a first opportunity to obtain parole.

3. A recent law review article addressing implementation of *Graham* and *Miller* shows that respondent's proposed actuarial approach is likely to lead to unconstitutional sentences for juvenile offenders

In *There Is No Meaningful Opportunity in Meaningless Data*, 18 U.S. Davis J. Juv. L. Pol'y 267, the authors explored the Colorado courts' implementation of the *Graham-Miller* mandate. Colorado courts, much like the respondent's actuarial proposal in this case, reduce the determination of whether a juvenile's sentence triggers a protection of a *Miller* individualized sentencing hearing to a comparison of the estimated life expectancy (as reflected in life expectancy tables) with the estimated parole eligibility date reported by the corrections department. (*Id.* at pp. 269-270; see also RB 23-25.)

The article concluded that

> Colorado's practice of estimating a juvenile's life expectancy and then sentencing him to a lengthy prison sentence that will potentially allow for release just prior to his death is inappropriate because: (1) using life expectancy as a sentencing guideline focuses on exacting maximum

> punishment and retribution; (2) the life tables currently being used provide estimate for the general population and should not be applied to the distinctive group of young people facing decades of incarceration, who are mostly poor and disproportionately black and Hispanic; and (3) sentences that deprive young people of the opportunity to demonstrate their maturity and rehabilitation until they become eligible for parole in their mid-fifties or even later could lead to the same hopelessness, irretrievable loss, and lack of motivation for change of juveniles receiving the death penalty (*Roper*), life without parole for a non-homicide offence (*Graham*), and life without parole for any offence committed by a juvenile (*Miller*).

(*There Is No Meaningful Opportunity in Meaningless Data*, 18 U.S. Davis J. Juv. L. Pol'y at pp. 287-288.)

Many of the key points made in this article apply with equal force to the respondent's proposed methodology. First, using a life expectancy table as a sentencing guideline focuses on maximum punishment and retribution and ignores the core teachings of *Ropers, Graham,* and *Miller* – that children are different from adults for sentencing purposes, that they are both less morally culpable and have greater capacity for reform. (*Miller*, 132 S.Ct. at p. 2468 ["individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentence misses too much if it treats every child as an adult"].) In the best case scenario, the use of a life

expectancy table creates only a possibility of a geriatric release, which is likely to lead to the same hopelessness and lack of motivation to change as a capital sentence or a sentence that is explicitly designated "without parole." (*There Is No Meaningful Opportunity in Meaningless Data*, 18 U.S. Davis J. Juv. L. Pol'y at pp. 288-289.)

Second, life expectancy tables overestimate how long a child can be expected to live in prison. Life expectancy is "a statistic that describes the 'center' of the distribution of the ages at which people in a birth cohort will die." It is usually reported as a "mean" or "average."[6] In mathematics, this means is that if we imagine a hypothetical distribution of numbers on a standard bell curve, the mean or average will be the tallest point of a perfectly symmetrical curve. Extrapolating this to a life expectancy table, if average life expectancy for all American men in 76 years, nearly half of the men

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[6] The Vital Statistics Table for 2010 cited by respondent is using "average" as a measure of life expectancy. (National Vital Statistics Report, Vol. 63, No. 7, p. 2)(http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_07.pdf (as of May 4, 2015).

will have died *before* reaching average life expectancy. (*There Is No Meaningful Opportunity in Meaningless Data,* 18 U.S. Davis J. Juv. L. Pol'y at p. 283.)

What further makes life expectancy tables unsuitable to act as sentencing guidelines is that they only report *average* life expectancy, a number representing only the center of a distribution. However, what is missing is the information regarding how representative this number is for any individual member in the group. For example, in a society where everyone either dies at birth or lives to 100, 50 is an accurate average life expectancy. Yet, for each individual member of that society, 50 would be a very poor estimate of how many years a person can expect to live. (*There Is No Meaningful Opportunity in Meaningless Data,* 18 U.S. Davis J. Juv. L. Pol'y at pp. 281-282.)

Similarly, in this case, a life expectancy table could only tell us that an average American man of Tyris's age can expect to live to 76 or 77 years. What it does not tell us is how representative that average number is for any individual member even in the general population, let alone when race and the likely impact of

incarceration on an offender's health are factored in. "[S]horter life expectancy, more variance around the estimated center of the distribution, and volatility of the estimate over time are all characteristics of the poorer groups within wealthier countries with overall high life expectancies." (*There Is No Meaningful Opportunity in Meaningless Data,* 18 U.S. Davis J. Juv. L. Pol'y at p. 282.)

Third, reducing the determination of whether a sentence is functionally life without parole to an actuarial table comparison raises difficult questions regarding consideration of demographic factors, such as gender, race, and age. (*There Is No Meaningful Opportunity in Meaningless Data,* 18 U.S. Davis J. Juv. L. Pol'y at p. 271.) On the one hand, failing to take into account an offender's age, race, gender, or the likely negative impact of long-term incarceration "overestimates the average length of life of young men and minorities, and introduces systematic bias by accepting validity of some date and rejecting or ignoring additional information provided in the very same table." (*Ibid;* see also AOB 39-44.) Sentencing is an

inherently individualized determination and it cannot ignore the reality of who is actually being sentenced.

On the other hand, taking those factors into account may also create disparities in sentencing, which may not have been intended by the U.S. Supreme Court. (*There Is No Meaningful Opportunity in Meaningless Data,* 18 U.S. Davis J. Juv. L. Pol'y at p. 271.)

But the solution to this difficulty is not to ignore the race information that is reported in the same life expectancy tables respondent urges this Court to consult, or the judicial decisions and social science research recognizing the significant impact of long-term incarceration on life expectancy. (*There Is No Meaningful Opportunity in Meaningless Data,* 18 U.S. Davis J. Juv. L. Pol'y at pp 283-284; AOB 41-44(*There Is No Meaningful Opportunity in Meaningless Data,* 18 U.S. Davis J. Juv. L. Pol'y at p. 283.).)

Instead, the proper resolution is to extend the protections of an individualized *Miller* hearing to any lengthy term of years sentence imposed on a juvenile. (AOB 35-39; *Null,* 836 N.W.2d at p. 72; *Bear Cloud,* 334 P.3d at p. 142.) The determination of whether a

sentence if functionally equivalent to life without parole should not boil down to an actuarial analysis or an epidemiological study. Instead, consistent with *Graham* and *Miller*, the focus must be on the amount of time a juvenile will have to spend behind bars before the first opportunity for parole, as well on whether he would have some meaningful opportunity to obtain parole and rejoin society. All relevant life expectancy information should be used by a sentencing judge, along with the other evidence concerning the *Miller* factors, on a case-by-case basis. (AOB 35-39; *Null*, 836 N.W.2d at p. 72; *Bear Cloud*, 334 P.3d at p. 142.)

Finally, while there may some ambiguity in the term "lengthy," it is significant that under section 3051, the longest period of time an offender must serve before parole eligibility is 25 years. Although this statute does not moot the Eighth Amendment violation, it represents a legislative judgment that to carry out the mandate or *Graham* and *Miller*, a first parole hearing must occur no later than 25th year of incarceration. (AOB 38, fn. 8.)

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D. To the Extent Life Expectancy Tables Are Relevant to Determining Whether 50-To-Life Sentence is a Functional Life Without Parole Sentence, Both Race and the Likely Negative Impact of Prolonged Incarceration Must Be Taken Into Account

Respondent errs in claiming that in determining whether Tyris's 50 years to life sentence is functionally equivalent to a sentence of life without parole, this Court should not consider either Tyris's race or the likely negative impact on life expectancy from long-term incarceration. (RB 25.)

In terms of race, as previously noted, failing to consider documented differences in life expectancy based on race overestimates the average life expectancy of young men and minorities and improperly accepts validity of some demographic data while rejecting or ignoring other data reported in the very same tables. (*There Is No Meaningful Opportunity in Meaningless Data,* 18 U.S. Davis J. Juv. L. Pol'y at p. 271.) Respondent fails to provide a reasoned distinction as to why it would be proper to consider age and gender, but not race. (RB 25-26.)

Respondent similarly errs in arguing that appellant "merely speculates that various prison conditions could lower his life expectancy." (RB 27.) Judicial decisions, as well as a significant body of social science research, have recognized that life expectancy of incarcerated youthful offenders is significantly reduced compared to that of the general population. (AOB 41-44; *Null*, 836 N.W.2d at p. 71; *Bear Cloud*, 334 P.3d at p. 142; *United States v. Taveras* (E.D.N.Y 2006) 436 F.Supp.2d 493, 500; see also 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 May 5, 2015).)

Also, research has shown that the combination of physical and mental decline makes aging inmates, on the average, 10 to 11.5 years older physiologically than their non-incarcerated age peers. (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) (http://libres.uncg.edu/ir/asu/f/Rosenberg_Ed_2007_Aging_Inmates.pdf) (as of May 5, 2015).

Similarly, the National Institute of Corrections classifies prisoners over 50 as "aging" due to the stress of incarceration and typical lack of appropriate health care prior to and during incarceration. (U.S. Dept. of Justice, Nat. Inst. of Corrections, Correctional Health Care:Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates(Feb. 2004) pp. 8-9 (http://nicic.gov/library/018735) (as of May 5, 2015).)

For California prisons, the most recent statistical information regarding the impact of incarceration on a person's life expectancy continues to be alarming. In 2012, the average age at the time of death was 55 or 57 (if suicide, homicide, and drug overdose cases are excluded. (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 May 5, 2014); see also *Brown v. Plata* (2011) 131 S.Ct. 1910, 1925-1926 & fns. 3 and 4.) For 2013, the average age at the time of death remained at 55; when suicides, homicides, and drug overdoses are excluded, the average age of the time of death is 59.

(http://www.cphcs.ca.gov/docs/resources/OTRES_DeathReviewAnalysisYear2013_20141027.pdf) (as of May 5, 2015).

Respondent attempts to quibble with the above statistics, arguing that it impossible to "quantify" the impact of prolonged incarceration on a particular offender's life.[7] (RB 27.) But this argument proceeds from a faulty premise that the mandate of *Graham* and *Miller* to provide a meaningful opportunity to obtain release and rejoin society is satisfied so long as the first parole opportunity comes at some point within the average life expectancy.

[7] It should be noted that the life expectancy tables, on which respondent's argument heavily relies, also report only average life expectancy estimates, which means that approximately half of the relevant group would die before reaching the average life expectancy. (*There Is No Meaningful Opportunity in Meaningless Data*, 18 U.S. Davis J. Juv. L. Pol'y at pp. 281-282.)

As previously explained, *Caballero* has not adopted this as a proper method to evaluate whether a 50 years to life sentence is functionally equivalent to life without parole.

Moreover, respondent's proposed methodology is contrary to the holdings and the rationale of *Graham* and *Miller*. (AOB 35-39.) A sentence of 50 years to life is equivalent to a sentence of life without parole for the purpose of *Graham* and *Miller* because an offender who spends half a century behind bars to attend his first parole hearing in his late 60s, at best, is looking at an opportunity for a prison-to-nursing home release. He would not have experienced any meaningful period of normal adult life in the community and all of the things that are associated with it.

E. Respondent Failed to Persuasively Address Appellant's Argument Regarding the Proposed Statutory Reformation Remedy of § 12022.53, Subd. (h), to Remedy the Eighth Amendment Violation

Should this Court agree with Tyris's position that his 50 years to life mandatory sentence violates *Miller*, the proper remedy would be to constitutionally reform section 12022.53, subdivision (h) to

allow the trial court to strike the 25-year section 12022.53, subdivision (d), gun use enhancement. (AOB 47-50.)

Respondent disagrees, pointing out that Tyris could be sentenced to a life without parole sentence if the sentencing court conducts an individualized *Miller* hearing and determines that Tyris is a "rare juvenile offender whose crime reflects irreparable corruption." (*Miller*, 132 S.Ct. at p. 2469.)

But Tyris has not asked this Court to weigh the *Miller* factors in the first instance. A weighing of those factors should be done by the sentencing court after the record concerning the *Miller* factors is fully developed. However, in the likely even the trial court finds that this is not a "rare" or "uncommon" case involving irreparable corruption, reformation of section 12022.53, subdivision (h), is necessary to give the trial court authority to impose a sentence that is not a functional life without parole sentence. (AOB 47-50; *Sandoval*, 41 Cal.4th at p. 844; *Roder*, 33 Cal.3d at p. 505.)

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II.

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

A. Introduction

A recent enactment of section 3051, while well-intentioned, does not moot Tyris's Eighth Amendment claim. (AOB 50-59; *Gutierrez*, 58 Cal.4th at p. 1386.)

One of the issues in *Gutierrez* was whether a recent enactment of section 1170, subdivision (d)(2), mooted a *Miller* claim because under that statute, a juvenile offender who received an life without parole sentence and served 15 years of it could petition three times to recall the sentence. This Court held that the *Miller* claim was not moot, reasoning that existence of a potential mechanism for resentencing after 15 to 24 years does not mean 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 despite the enactment of section 1170, subdivision

(d)(2). (*Id.* at p. 1386.) *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.*)

Here, as well, while section 3051 works somewhat differently than the statute at issue in *Gutierrez*, those differences are immaterial. In both cases, the original unconstitutional sentence remains fully intact and any possible consideration of amenability to parole 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 mandate imposition of a constitutional sentence *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.)

In addition, under the youth offender parole system, no judicial officer would ever exercise sentencing discretion to apply the *Miller* factors; Board of Parole members are not judges, or

necessarily attorneys. (AOB 57-58; § 4801, subd. (c); see also §§ 5075 and 5075.6, subd. (a)(1).) Sentencing is a judicial, not an executive function. (*People v. Clancey* (2013) 56 Cal.4th 562, 574; *People v. Navarro* (1972) 7 Cal.3d 248, 258 ["The imposition of sentence and the exercise of sentencing discretion are fundamentally and inherently judicial functions"].)

Finally, the youthful offender parole system is more problematic than section 1170, subdivision (d)(2), because it pushes consideration of the *Miller* factors even further into the future and, thus, completely undermines their evaluation. (AOB 58-59.) Twenty five years later, the evidence relevant to the sentencing determination – e.g., school records, witnesses who knew the offender's childhood circumstances that may have affected criminality, medical and mental health records – may no longer be available, or memories may have faded so that useful testimony or information cannot be provided.

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B. Respondent is Mistaken in Claiming that Imposition of a Constitutional Sentence is Not Required at the Time of the Original Sentencing Hearing

Respondent argues that neither *Miller* nor *Gutierrez* requires the sentencing judge to decide when each juvenile offender will get his or her meaningful opportunity to obtain release through demonstrated maturity and rehabilitation. (RB 14.) However, this Court has rejected this exact same argument in *Gutierrez*. *Gutierrez* held that *Graham's* requirement of meaningful opportunity to obtain release is a constitutionally required alternative to making the judgment at the outset (i.e., at the time of the original sentencing) that a juvenile offender will never be fit to rejoin society, not "after the fact corrective." (*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.)

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C. Contrary to the Respondent's Argument, and Like the Statute at Issue in *Gutierrez*, Section 3051 Leaves the Unconstitutional 50 Years to Life Sentence Fully Intact

There is no merit in respondent's attempt to distinguish this case from *Gutierrez* on the ground that in light of the enactment of the youth offender parole system, Tyris "no longer serves a sentence arguably equivalent to life in prison without the possibility of parole."[8] (RB 5.)

Although the youthful offender parole system (through changes to §§ 3041 and 3041, and the enactment of § 3051) provides for a parole hearing in 25 years for Tyris and similarly situated juvenile offenders, it does not modify the original 50 years to life sentence. Tellingly, respondent does not even contend that the original unconstitutional 50 years to life sentence is vacated or that it must be modified to 25 years to life in prison in light of the legislative change. (RB 33.) Instead, respondent describes the effect of the new legislation as "actually preclud[ing] any automatic

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[8] Appellant does not dispute that *if* he had, in fact, received a sentence of 25 years to life, such a term would not be a functional life without parole sentence under *Graham* and *Miller*.

execution of an indeterminate or determinate term in excess of a 25-year parole eligibility date for juvenile offenders like [Tyris]." (RB 15.) In other words, the youth offender parole system is engrafted on top of the original sentence, it might operate as a *de facto* stay of the original sentence, but it does not vacate or invalidate it.

Since the original unconstitutional sentence remains fully intact, *Gutierrez* controls in this case. In rejecting an analogous mootness argument, *Gutierrez* reasoned that the original unconstitutional sentence remained fully intact and *Graham* mandates that meaningful opportunity to obtain release must be provided at the time of the original sentence. (*Gutierrez,* 58 Cal.4th at p. 1386.)

For similar reasons, respondent errs in dismissing appellant's concerns about the youth offender parole system being repeatedly by the Legislature or the electorate. Article I of the United States Constitution prohibits the State from passing any "ex post facto law." (U.S. Const., Art I, § 9, cl. 3; Art. I, § 10, cl. 1; *Miller v. Florida* (1987) 482 U.S. 423, 429.) This includes increasing punishment to a

term that is greater than the one the law provided when the crime was committed. (*Miller*, 482 U.S. at p. 429, citing *Calder v. Bull* (1798) 3 Dall. 386.) California constitution includes a similar prohibition. (Cal. Const., Art I, §9; *In re Stanworth* (1982) 33 Cal.3d 176, 180.)

But in this case, the punishment at the time of the original crime was 50 years to life. Since section 3051 did not vacate that original sentence, the 50-to-life term is reasonably likely to be deemed the controlling sentence for the purpose of the ex post facto analysis. Therefore, so long as any change to the youthful offender parole hearing system would not leave appellant with a sentence greater than 50 years to life, there would likely be no ex post facto prohibition against such a change.

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

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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 6,221 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: May 8, 2015 By: _____

Gene D. Vorobyov
Attorney for Appellant
TYRIS L. FRANKLIN

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 450 Taraval Street, # 112, San Francisco, CA 94116. On the date shown below, I served the within APPELLANT'S REPLY BRIEF ON THE MERITS to the following parties hereinafter named by:

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

California Court of Appeal – via the Truefiling system

Juliet B. Haley, Deputy Attorney General
SFAG.Docketing@doj.ca.gov

Brad O'Connell, Assistant Project Director @ FDAP
eservice@fdap.org

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:

Barry Grove, Deputy District Attorney
900 Ward Street
Martinez, CA 94553

Hon. Leslie Landau
100-37th Street
Richmond, CA 94805

Tyris Franklin, CDC # AM4447
P.O. Box 921
Imperial, CA 92251-921

Elizabeth Harrigan, Deputy Public Defender
800 Ferry Street
Martinez, CA 94553

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

Executed on May 8, 2015, at San Francisco, California.

/s/ Gene D. Vorobyov