In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TYRIS LAMAR FRANKLIN,

Defendant and Appellant.

Case No. S217699

First Appellate District, Division Three, Case No. A135607
Contra Costa County Superior Court, Case No. 51103019
The Honorable Leslie Landau, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

INTRODUCTION

After the completion of briefing, the United Supreme Court decided *Montgomery v. Louisiana* (Jan. 25, 2016, No. 14-280) 577 U.S. ___ [2016 U.S. LEXIS 862, 2016 WL 280758]. *Montgomery* holds a violation of *Miller v. Alabama*, (2012) ___567 U.S. ___ [132 S.Ct. 2455] can be remedied by permitting juvenile homicide offenders serving a mandatory life-without-parole sentence to be considered for parole, rather than by resentencing such offenders. This supplemental brief discusses the impact of *Montgomery* on this case.

ARGUMENT

MONTGOMERY COMPELS AFFIRMANCE OF THE COURT OF APPEAL'S DECISION

In *Montgomery*, the petitioner was 17 years old when he shot and killed a deputy sheriff in 1963. He was sentenced to life without possibility of parole (LWOP). Following the high court's holding in *Miller*, the petitioner sought collateral review of his LWOP sentence in the Louisiana courts, but review was denied on procedural grounds. The United States Supreme Court granted certiorari and determined that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." (*Montgomery*, 2016 WL 280758 at p. *16.)

The Supreme Court then addressed the further question whether "*Miller*'s prohibition on mandatory life without parole for juvenile offenders indeed did announce a new substantive rule that, under the Constitution, must be retroactive." (*Montgomery*, 2016 WL 280758 at p. *11.) It answered that question affirmatively. (*Id.* at p. *13.) While acknowledging that *Miller* did not impose upon trial courts a formal factfinding requirement regarding a child's incorrigibility, the high court

said the absence of such a requirement "does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." (*Id.* at p. *15.)

Finally, the high court turned to the issue of how to cure a *Miller* Eighth Amendment violation and held as follows:

> Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. *A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.* See, e.g., Wyo. Stat. Ann. §6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.
>
> Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.

(*Montgomery*, 2016 WL 280758 at p. *16, italics added.)

The Court concluded that "prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their *hope for some years of life outside prison walls* must be restored." (*Ibid.*, italics added.)

A dissent in *Montgomery* joined by three justices pointedly reinforces the latter holding: "The majority does not seriously expect state and federal collateral-review tribunals to engage in this silliness, probing the evidence of 'incorrigibility' that existed decades ago when defendants were

sentenced. What the majority expects (and intends) to happen is set forth in the following not-so-subtle invitation: 'A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.'" (*Montgomery*, 2016 WL 280758 at p. *24 (dis. opn. of Scalia, J.).)

Montgomery makes clear that the means of curing *Miller* error is not limited to a choice between a retrospective incorrigibility hearing, a judicial resentencing hearing in each individual case, or a guaranteed release date. Indeed, in concluding that the availability of a parole hearing obviates the constitutional infirmity of a judicially imposed mandatory sentence of life imprisonment without consideration of a juvenile offender's youth and immaturity, *Montgomery* specifically approves of Wyoming's parole eligibility statute. (*Montgomery*, 2016 WL 280758, at p. *16.) Wyoming Statutes Annotated, Title 6, Crimes and Offenses, section 6-10-301, subdivision (c), provides in pertinent part: "A person sentenced to life imprisonment for an offense committed before the person reached the age of eighteen (18) years shall be eligible for parole after commutation of his sentence to a term of years or after having served twenty-five (25) years of incarceration." Thus, the Wyoming statute, enacted after *Miller*, affords a youthful offender serving life imprisonment an eligibility to be paroled after 25 years, without resentencing and without providing for a guaranteed release.

Montgomery's analysis is directly applicable here. Notwithstanding his court-pronounced sentence of fifty years to life, Penal Code section 3051, subdivision (b)(3) mandates that appellant be given consideration for parole after 25 years. "A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of

incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (*Ibid.*, added by Stats. 2013, c. 312 (S.B. 260), § 4.)

We have argued that in light of Penal Code section 3051, a term of imprisonment of 50 years to life for murder committed by a 16-year-old offender such as appellant is not the functional equivalent of life without possibility of parole because section 3051 mandates parole eligibility after half the minimum term. Considering the new parole eligibility date provided by Penal Code section 3051, appellant's sentence is no longer the functional equivalent of a constitutionally infirm life sentence, if it ever was.

Montgomery confirms that Penal Code section 3051 cured any arguable *Miller* error. The absence of judicial consideration of mitigating factors at the initial sentencing does not alter the efficacy of that remedy for a youthful offender claiming an indeterminate sentence is functionally equivalent to LWOP. *Montgomery* resolves that a state statute authorizing a parole eligibility hearing after 25 years is a constitutionally compliant remedy for *Miller* error when the sentence actually is LWOP without the need for any retrospective incorrigibility determination. The same holds true for a purported functional LWOP sentence.

The Court of Appeal correctly concluded in light of Penal Code section 3051, that "because defendant no longer faces the functional equivalent of life without the possibility of parole for the crime he committed as a juvenile, he is not entitled to a new sentencing hearing under *Miller* or remand under *Caballero* to determine the time for parole eligibility." (Typed Opn., p. 18, fn. 6.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of the Court of Appeal be affirmed.

Dated: February 16, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 1,180 words.

Dated: February 16, 2016

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DECLARATION OF SERVICE

Case Name: ***People v. Franklin*** No.: **S217699**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 16, 2016, I served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 16, 2016, at San Francisco, California.

J. Wong
Declarant

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Signature