IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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 SUPPLEMENTAL BRIEF

[Cal. R. of Court 8.520(d)]

After Decision by the Court of Appeal
First Appellate District, Division Three
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INTRODUCTION & SUMMARY OF ARGUMENT

Pursuant to California Rule of Court 8.520, appellant Tyris Franklin submits the following supplemental brief to address the impact of *Montgomery v. Louisiana* (2016) _ U.S. _, 136 S.Ct. 718 [2016 WL 280758] ("*Montgomery*"). *Montgomery* was decided after the completion of merits briefing in this case.

Montgomery does not alter the analysis presented by Tyris in the merits briefing regarding Penal Code section 3051 not mooting the *Miller*[1] violation in this case.[2] First, *Montgomery*'s discussion of parole eligibility as a permissive remedy for a *Miller* violation is limited to cases that are already final on direct review. It has no applicability to cases like Tyris's case, which is not yet final.

Second, to the extent *Montgomery* has any applicability to cases still on direct appeal, the Wyoming legislative scheme *Montgomery* cited with approval is materially different from section 3051. Whereas the Wyoming statute actually modifies the punishment to a level that is no longer a functional life without parole sentence, section 3051 leaves the unconstitutional sentence intact. This is a meaningful distinction. Legislature has the power to remedy a constitutional

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[1] *Miller v. Alabama* (2012) 132 S.Ct. 2455 ("*Miller*").

[2] All further unassigned references are to the California Penal Code.

violation by reducing punishment to a level that is no longer a functional life without parole sentence, which is what Wyoming has done.[3]

In contrast, section 3051 leaves the unconstitutional sentence intact. Thus, what this Court held in *Gutierrez* about section 1170, subdivision (d)(2), applies with equal force to section 3051 -- the sentence must be constitutional at its inception and existence of a possible mechanism for resentencing decades into the future does not mean the initial sentence is not effectively life without the possibility of parole. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1386; see also *Miller*, 132 S.Ct. at p. 2469.)

Accordingly, section 3051 does not moot the *Miller* violation. The Court of Appeal's judgment must be reversed.

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[3] Appellant concedes that if this Court were to find that his sentence is modified by operation of law to a sentence of 25 years to life in prison, this would moot the *Miller* violation.

ARGUMENT

I.

Montgomery's Discussion of Parole Eligibility as Permissible Way to Remedy a *Miller* Violation is Limited to Cases Final on Direct Review

A. The Holding of *Montgomery*

In *Montgomery*, the Supreme Court addressed the issue of whether *Miller*, 132 S. Ct. 2455, applies retroactively to juvenile offenders whose convictions and sentences were final when *Miller* was decided. (*Montgomery*, 135 S.Ct. at p. 725.) At the time *Miller* was decided, Montgomery (age 69) had served 50 years of a life without parole sentence for a homicide he committed when he was 17 years old. He had spent almost his entire life in prison. (*Id.* at pp. 725-726.)

The six-justice majority held that *Miller* created a substantive guarantee under the Eighth Amendment that sentencing a child to life without parole is excessive "for all but the rare juvenile offenders whose crime reflects irreparable corruption." (*Id.* at p. 734.) *Montgomery* reasoned that finding *Miller* to pronounce a substantive rule of constitutional law, comports with *Teague v. Lane* (1989) 489 U.S. 288, a decision requiring balancing of the liberty interests of those

imprisoned pursuant to a sentence later deemed unconstitutional against the goals of finality and comity. (*Id.*)

In explaining why this decision complies with the balancing of interests identified in *Teague*, *Montgomery* further stated that making *Miller* retroactive would not unduly burden the States or disturb finality of state convictions because States may remedy a *Miller* violation by making a juvenile offender eligible for parole, rather than by resentencing them. (*Montgomery*, 135 S.Ct. at p. 736, citing e.g., Wyo. Stat. Ann. § 6-10-301(c) (2013). Those prisoners who have demonstrated rehabilitation will get an opportunity for release while those who have shown an inability to reform will continue to serve life sentences. (*Montgomery*, 135 S.Ct. at p. 736.) As an example, the Court cited Montgomery himself, who has allegedly amassed a significant showing of rehabilitation, which he would now have an opportunity to present to a parole board. (*Ibid.*)

B. *Montgomery's* Discussion of Parole as a Possible Remedy for a *Miller* Violation Is Limited to Cases That Are Final on Direct Review

Appellant disagrees with the State's argument that *Montgomery* "compels" affirmance of the Court of Appeal's decision. Appellant submits that for several reasons, this Court should read *Montgomery* narrowly as discussing parole as a

permissible way to remedy a *Miller* violation in cases already final on direct review.

Such reading of *Montgomery* is supported both by its facts and its reasoning. The petitioner in *Montgomery* had been sentenced to life in prison and had served 50 years of that sentence by the time *Miller* was decided. When a case has been final on direct review for so many years, the states' interest in finality of convictions and the likely burden of conducting a resentencing hearing may well make parole eligibility an acceptable way to remedy a *Miller* violation. Evidence is destroyed, witnesses are likely dead, and there may not be a ready mechanism for appointment of competent counsel. But these concerns are not present in a case like appellant's case, which is not yet final on direct review, in which the sentencing hearing occurred only a few years ago, and for which there is an established process for appointment of counsel.

Similarly, *Montgomery*'s rationale for finding parole an acceptable remedy for a *Miller* violation was based on concerns – not imposing an onerous burden on the States and not disturbing finality of state convictions – that apply primarily to cases already final on direct review. A case like appellant's, which is not yet final on direct review, which does not involve stale evidence, and for

which there is a readily available mechanism to appoint counsel, does not implicate those concerns.

Moreover, there is another prudential reason to read *Montgomery* narrowly, as making parole eligibility a permissible remedy for a *Miller* violation only in cases already final on direct review. The issue of parole eligibility was not one on which certiorari was granted in *Montgomery* and it was not briefed by the parties. It is not an issue raised by the facts in *Montgomery*. Though the majority did address it briefly, it did so only to explain why the decision to make *Miller* retroactive was consistent with the comity and federalism interests discussed in *Teague*. For these reasons, it would be a significant mistake to read *Montgomery* as broadly endorsing any and all legislative attempts to remedy a *Miller* violation by altering parole eligibility.

In light of the above, *Montgomery* does not impact the argument presented in the merits briefing regarding why section 3051 (though well intentioned) does not moot the *Miller* violation. (AOB 50-59; ARB 29-35; *Gutierrez*, 58 Cal.4th at p. 1386.)

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II.

To The Extent *Montgomery*'s Approval of Parole as a Constitutional Remedy Extends Beyond Cases on Collateral Review, the Wyoming Statutory Scheme Cited by the Supreme Court With Approval is Materially Different Than California's Youth Offender Parole Hearing Scheme

Even if this Court reads *Montgomery* as endorsing parole as a possible remedy for a *Miller* violation, the type of legislative scheme endorsed by *Montgomery* is materially different from section 3051.

Montgomery cited Wyoming Stat. Ann. Section 6-10-301(c) as an example of a statute, which altered a juvenile defendant's parole eligibility in a way to effectively remedy a *Miller* violation. Until 2013, a juvenile defendant convicted of first-degree murder in Wyoming received a mandatory sentence of life without the possibility of parole. (See e.g., *State v. Mares* (Wyo. 2014) 335 P.3d 487, 495.) However, in 2013, in response to *Miller*, the Wyoming legislature amended its law, which converted a juvenile defendant's life without parole sentence to life with parole (after serving a minimum of 25 years).[4] (*Id* at pp. 496, 498; see also Wyo. Stat. Ann § 6-10-301(c).)

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[4] The relevant Wyoming statutes are Wyo. Stat. Ann., §§ 6-10-301 (c) and 7-13-402(a). (*Mares*, 335 P. 3d. at p. 496.) They provide:

The Wyoming legislative remedy is materially different from section 3051 because unlike section 3051, the Wyoming amended statutes actually modify the juvenile defendant's punishment to one that is no longer a functional life without parole sentence. In contrast, section 3051 leaves the functional life without parole sentence of 50 years to life fully intact. (ARB 33-35). Indeed, the State has carefully avoided taking a position that Tyris's sentence (or the sentences of

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> Any sentence other than a sentence specifically designated as a sentence of life imprisonment without parole is subject to commutation by the governor. A person sentenced to life imprisonment for an offense committed after the person reached the age of eighteen (18) years is not eligible for parole unless the governor has commuted the person's sentence to a term of years. 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, except that if the person committed any of the acts specified in W.S. 713402(b) after having reached the age of eighteen (18) years the person shall not be eligible for parole.

(Wyo. Stat. Ann. § 6-10-301(c));

> The board may grant a parole to any person imprisoned in any institution under sentence, except a sentence of life imprisonment without parole or a life sentence, ordered by any district court of this state, provided the person has served the minimum term pronounced by the trial court less good time, if any, granted under rules promulgated pursuant to W.S. 713420. The board may also grant parole to a person serving a sentence for an offense committed before the person reached the age of eighteen (18) years of age as provided in W.S. 6-10-301(c)."

(Wyo. Stat. Ann. § 7-13-402(a).)

similarly situated individuals) has been modified by operation of law to a term that is no longer a functional life without parole sentence. (See e.g., State's Supplemental Brief re: *Montgomery* at p. 4.)

This is a distinction with a difference. Appellant does not dispute that it would be within the power of the Legislature to address a *Miller* violation by changing punishment to one that is no longer a functional equivalent of a life without parole sentence. (See e.g., *United States v. Bajakajian* (1998) 524 U.S. 321, 337 ["judgments about the appropriate punishment for an offense belong in the first instance to the legislature"]; *People v. Tanner* (1979) 24 Cal.3d 514, 519, fn. 3 ["the Legislature possesses the exclusive power to define criminal offenses and prescribe penalties or punishments"].)

The problem with section 3051 is that the California legislature has not yet exercised its power to actually reduce punishment to a non-functional LWOP level. As a result, what this Court has said in *Gutierrez* about section 1170, subdivision (d)(2), remains true of section 3051. Existence of a potential mechanism for resentencing decades after the original sentence 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.) Both this Court and

the United States Supreme Court have consistently held that a constitutional sentence must be imposed at the time of the original sentence. (*Miller*, 132 S.Ct. at p. 2469; *Gutierrez*, 58 Cal.4th at p. 1386.)

Finally, as addressed in the merits briefing (and noted by two different intermediate appellate courts), section 3051 is also problematic because there is no guarantee that it is going to be in place in 25 years. Should the statute be repealed and leave Tyris with a sentence that is no greater than 50 years to life, there may not be an ex post facto prohibition against such a change. (ARB 34-35.)

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CONCLUSION

Montgomery does not impact the analysis presented by appellant in the merits briefing. 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.

This Court must therefore reverse the judgment of the Court of Appeal.

DATE: February 22, 2016 By: _____

Gene D. Vorobyov
Attorney for Appellant
TYRIS L. FRANKLIN

CERTIFICATE OF WORD COUNT

I certify that this brief consists of 2,070 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: February 22, 2016 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 450 Taraval Street, # 112, San Francisco, CA 94116. On the date shown below, I served the within APPELLANT'S SUPPLEMENTAL BRIEF RE: MONTGOMERY V. LOUISIANA, to the following parties hereinafter named by:

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

Executed on February 22, 2016, at San Francisco, California.

/s/ Gene D. Vorobyov