S 190647

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The People of the State of California,
Plaintiff and Respondent
v.
Rodrigo Caballero,
Defendant and Appellant

Case No. B 217709

In re Rodrigo Caballero, on Habeas Corpus

Case No. B 221833

Court of Appeal, Second Appellate District, Division 4

Appeal from Superior Court, Los Angeles County, Hon. Hayden Zacky, Judge (LASC Case No. MA043902)

PETITIONER'S OPENING BRIEF ON THE MERITS

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Question

Does a sentence of 110 years to life for a juvenile convicted of committing non-homicide offenses constitute cruel and unusual punishment under the Eighth Amendment on the ground it is the functional equivalent of a life sentence without the possibility of parole? (See *Graham v. Florida* (2010) 560 U.S. __ ,130 S.Ct. 2011, 176 L.Ed.2d 825.)

Answer

Yes. Petitioner's sentence of 110 years to life is equivalent to life without possibility of parole in all but name. Both hold no possibility of release. Petitioner did not commit murder, but received a sentence making him ineligible for parole unless he lives to age 122. He will therefore become parole-eligible only after death. This is the functional equivalent of life with no possibility of parole.

Graham held when a minor is sentenced to life for a non-homicide offense, he must be given a realistic opportunity for release before his sentence ends. (*Graham v. Florida* (2010) 560 U.S. __ [130 S.Ct. 2011, 2034]; *hereinafter* "*Graham*"). But an abstract possibility Petitioner might qualify for parole if he survives to 122 is meaningless. To deny relief because of sentencing semantics, as the Court of Appeal suggests, is to elevate form over substance in the

cruelest manner. It renders hollow *Graham's* promise of an opportunity for redemption.

Petitioner will die in prison unless given a genuine prospect to someday prove himself worthy of parole. The judgment of the Court of Appeal should be reversed because it is unconstitutional to condemn a teenager who did not kill to a lifetime of confinement with no chance of release.

Facts

In June 2007, after an exchange of gang slogans, shots were fired at three Palmdale teenagers; one suffered a non-fatal wound. Within 48 hours, Petitioner Rodrigo Caballero, 16 years old, was arraigned in juvenile court on three counts of attempted murder with gang and firearm enhancements. (*People v. Caballero* (2011) 191 Cal.App.4th 1248, 1250-51, review granted April 13, 2011 (S190647); *hereinafter "Caballero"*).

Although Rodrigo was diagnosed with schizophrenia and was found incompetent to stand trial in juvenile court for one year, his case was ultimately transferred to superior court for trial as an adult. After eyewitnesses refused to identify him in court, Petitioner waived his right to remain silent, took the stand, and confessed to the shooting. Verdicts were returned in about 30 minutes. He was immediately sentenced to three consecutive terms totaling 110 years to life.

Petitioner's Mental Disease

Rodrigo "began experiencing auditory hallucinations soon after his arrest." (Augmented Record; *hereinafter* "Aug.", 2). Petitioner was diagnosed "with a severely disabling form of Schizophrenia" and paranoia. (Juvenile Record, *hereinafter* "JR", 16). He was "convinced that each of his attorneys was conspiring to keep him confined." (*Ibid.*) Symptoms included outbursts resulting in the deployment of physical restraints in court (JR 19, 55); threatening suicide (JR 55); and masturbating in front of others. (JR 55). Rodrigo trivialized the nature of the charges. (JR 59). He believed a misdemeanor was more serious than a felony (JR 56) and "his thoughts could be heard by others, a symptom known as thought broadcasting that is commonly observed in individuals with Schizophrenia." (Aug. 2-3.) He was deemed incompetent (JR 59), unable to cooperate with counsel in a rational manner (JR 16), and "totally and utterly unable to [defend himself]." (JR 16).

Rodrigo was involuntarily committed in November 2007 and started receiving the antipsychotic Risperdal in 2008. (Aug. 2, 5.) By June 2008, one year before trial, the juvenile court found that Rodrigo had regained competence. (Aug. 1, 5; Caballero, *supra,* slip opn. at p. 4). Although his mental disease was in remission at the time of this finding, a forensic psychiatrist warned it was "imperative that he continue to take his prescribed antipsychotic medication, both to insure continued competence and to prevent him from becoming

dangerous or gravely disabled due to a recurrence of psychosis." (Aug. 3).[1]

Trial commenced in superior court one year later. None of the percipient witnesses identified Petitioner as the assailant in court. (Reporters Transcript; *hereinafter* "RT" 918, 929, 946, 972, 1206.)

Petitioner's Waiver

The trial judge advised Petitioner of his right to remain silent or testify and asked, "Which one would you like to do?"

THE DEFENDANT: All of them.
THE COURT: Pardon me?
THE DEFENDANT: All of them.
THE COURT: What? You can't do all of them. Which one do you want to do?
THE DEFENDANT: Can you repeat what you said?

(RT 1220-21).

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[1] In the consolidated petition for writ of habeas corpus, Petitioner has alleged Risperdal treatment was discontinued in adult lockup 7 months before trial. This caused him to be tried while incompetent resulting in structural error. In addition, it was error not to interpose a defense of mental disease or defect. There was a reasonable chance his mental disease was present at the time the crime was committed and could have resulted in a different verdict. (*See People v. Caballero and Consolidated Case*, time for granting rev. extended to May 24, 2011, S190810.)

Petitioner's Testimony

Petitioner took the stand and confessed: "I was straight trying to kill somebody." (RT 1227). "They were my enemies. I am a gang banger, you know. I am supposed to know who is my enemies and who is not." (RT 1229). I did it "because they were my enemies . . . because they were from a different neighborhood than I was." (RT 1226-27). "I just seen them, shot at them, and that's about it. Went home. And then cops came the next day and arrested me." (RT 1228). "My intent wasn't to kill them. I was just shooting at them [because] they were my enemies." (RT 1230).

Rodrigo testified he never saw or had met the shooting victims. (RT 1231). He was unable to remember anything before the shooting, including the car ride. *Ibid.* And he couldn't remember that a gang member and shooting victim had testified that very morning. (RT 1220, 1228). Memory lapses were one of the manifestations of Rodrigo's mental disease.[2] For example, he remembered being arrested a day after the shooting (RT 1228), but not the police interview (RT 1226).

The prosecutor waived cross examination. In closing, the district attorney conceded although identification may have been an issue before Petitioner testified, it wasn't an issue any more. (RT

[2] At the time of his first forensic examination when he was 16, Rodrigo couldn't remember where he went to elementary school or where he attended the ninth grade of high school. (JR 18).

1262). Rodrigo, claimed the prosecutor, had begged the jury to convict him. (RT 1262.)

Sentencing

Guilt verdicts were returned in about 30 minutes on three counts of attempted murder, and true findings on each enhancement including special findings of willfulness, deliberateness and premeditation on each count (Penal Code §§664, 187(a)); personal discharge of a firearm causing great bodily injury on count one (§12022.53(d)); use and discharge of a firearm on each count (§§12022.53 (b) and (c)); and promotion of a criminal street gang on each count (§186.22 (b) (1) (c)). (Clerk's Transcript; *hereinafter* "CT" 86). Time was waived and three consecutive life terms totaling 110 years-to-life were immediately imposed upon Rodrigo.

Argument

I. Petitioner's Sentence is the Functional Equivalent Of Life with No Possibility of Parole Because Both Carry No Possibility of Release

Petitioner will become parole-eligible only after death. This is the functional equivalent of life with no possibility of parole. (*See People v. Ayon* (1996) 46 Cal.App.4th 385, 396 [sentence of 240 years to life is the functional equivalent of life without possibility of parole]; *Andrade v. Attorney General of the State of California* (9th Cir. 2001) 270 F.3d 743, 759 [sentence of 50 years to life for 37-year-old was the functional equivalent of life without possibility of parole] ["It is thus more likely than not that Andrade will spend the remainder of his life in prison without ever becoming eligible for parole."]; *People v. Mendez* (2010) 188 Cal.App.4th 47, 63 [16-year-old's sentence of 84 to life was materially indistinguishable from sentence of life without possibility of parole because parole eligibility at age 88 exceeds life expectancy], *hereinafter* "*Mendez*"; *accord People v. Nunez* (2011) ____ Cal.App.4th ____ (G042873) (May 10, 2011) (Slip opn. at p. 3) [a sentence for a term of years exceeding the life expectancy of a juvenile, but without the "life without possibility of parole label," does not pass constitutional muster based on a theoretical, but illusory parole date] [minor's sentence of 175 to life for nonhomicide offenses far exceeds constitutional range] *hereinafter*

"Nunez"; *see also Summer v. Shuman* (1967) 483 U.S. 66, 83 [finding that "there is no basis for distinguishing for purposes of deterrence between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy."].).

Rodrigo was born in 1990, committed the offenses at age 16,[3] was sentenced at 18, and will become parole-eligible 101 years from now, in 2112.[4] Like the life term at issue in *Graham*, Petitioner's sentence affords no possibility of release unless granted clemency.[5]

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[3] Petitioner's age at the time of the offense was identical to that of the defendant in *Mendez*, *supra*, a decision decided by the same Court of Appeal as the instant case.

[4] Petitioner's minimum eligible parole date is June 5, 2112 when he turns 122. *Cf.* Dept. of Corrections and Rehabilitation *Calculation Worksheet Indeterminate*, Attorney General's Supplemental Letter Brief (Nov. 2, 2010). Penal Code §3046(b) requires that Petitioner serve a minimum of 110 years before becoming parole-eligible.

[5] Life expectancy for long-term incarcerated youth is substantially lower than their free peers' because they are subjected to higher incidences of abuse, violence, and serve proportionately greater percentages of their lives behind bars during formative development. For example, children doing time in adult prisons are five times more likely to be raped. (De la Vega & Leighton, *Sentencing Our Children to Die in Prison: Global Law & Practice*, 42 U.S.F.L. REV. 983, 984 at n. 5 (2008).) Moreover, their quality of health care is severely compromised. Imprisoned youth are up to twenty times more likely to have serious mental disorders than comparable teens. (Seena Fazel, et al., *Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys,* 47 J. AM. ACAD. CHILD ADOLESCENT PSYCH. 1010, 1016 (2008).) Confinement in adult lockup aggravates the condition of minors with disabilities. They are at greater risk of

He is therefore serving a sentence equivalent to life without parole for non-homicide offenses.

The Attorney General concedes as much. (*Supplemental Letter Brief* 3 (Nov. 2, 2010) ["Thus, the sentence here constitutes 'de facto LWOP.'"]).

The most recent pronouncement from the Court of Appeal confirms that a sentence of a term of years that precludes parole for a nonhomicide juvenile offender is cruel and unusual under any interpretation of *Graham*: "A term of years effectively denying any possibility of parole is no less severe than an LWOP term. Removing the 'LWOP' designation does not confer any greater penological justification. Nor does tinkering with the label somehow increase a juvenile's culpability. Finding a determinate sentence exceeding a juvenile's life expectancy constitutional because it is not labeled an LWOP sentence is Orwellian. Simply put, a distinction based on changing a label, as the trial court did, is arbitrary and baseless." *Nunez, supra,* slip opn. at p. 13.

Rodrigo Caballero's 110 year to life sentence denies him any possibility of parole during a lifetime of incarceration. Accordingly, the judgment of the Court of Appeal should be reversed.

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depression and increased suicide. (Hayes, U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Suicide in Confinement: A National Survey* 1-2 (2009).) The constellation of symptoms Petitioner displayed shortly after arrest and his detention in adult jail, including auditory hallucinations, attempted suicide, and paranoia proves the claim.

II. Petitioner's Sentence is Unconstitutional Because He is Ineligible for Release During a Lifetime of Confinement

Graham "applies to an entire class of offenders who have committed a range of crimes." (*Graham, supra,* 130 S.Ct. at pp. 2022-23.) Petitioner belongs to this protected class because he is (1) a minor; (2) convicted of non-homicide offenses; and (3) received a life sentence with no realistic possibility of release before the end of his term. Terrance Graham's sentence was reversed not because he was sentenced to "life without possibility of parole", but because Florida life sentences hold no possibility of release. The Eighth Amendment prohibits sentencing minors like Rodrigo Caballero who are convicted of non-homicide offenses to life, life without possibility of parole, or any extreme sentence if release is, in practice, foreclosed.

A. *Graham* Applies to a Term of Years Sentence

Graham forbids sentencing minors to life terms for non-homicide offenses that preclude any possibility of release. The broad sweep of the decision includes Petitioner's 110-year-to-life term:

> The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence.

(*Graham, supra*, 130 S.Ct. at p. 2022.)

Powerful language at the end of the majority's opinion reinforces the conclusion that *all* life terms are implicated:

> A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.

(*Graham, supra*, 130 S.Ct. at p. 2034.)

Hence, the conclusion of the Court of Appeal that "no language in *Graham* suggests that the case applies to [Petitioner's term of years (110) to life] sentence" is untrue. (*Caballero, supra,* slip opn. at p. 18). In fact, the same Court of Appeal now concedes *Graham* can be read to extend relief to a term of years sentence, but declines to do so. (*People v. Ramirez* (2011) ____ Cal.App.4th ____ (B220528) (March 16, 2011) (Slip opn. at 13) [minor's sentence of 120 to life for non-homicide offenses affirmed]).

B. The Court of Appeal Misinterpreted *Graham*

The Court of Appeal misses the mark because its literal attempt to distinguish *Graham* with a fixation on semantics is not persuasive. The court's cramped reading of *Graham's* use of the term "life without parole" is misplaced. (*Caballero, supra,* slip opn. at p. 18, 20). *Graham*'s holding does not mean only defendants with a prison sentence literally worded as "life without parole" are entitled to relief.

(*Graham, supra,* 130 S.Ct. at p. 2022). Rather, Terrance Graham's life without parole sentence—and those of other juveniles who committed non-homicides and received life without parole sentences—was declared unconstitutional because it carried **no possibility of parole**—not because they received sentences phrased with the exact words "life with no possibility of parole." (*See Graham, supra,* 130 S.Ct. at p. 2029 ["Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a ***chance to demonstrate*** growth and maturity."] [emphasis added]; *accord People v. Nunez, supra*, slip opn. at pp. 2-3 ["*Graham* invalidated a de facto sentence of life without the possibility of parole as a sentencing option for juveniles who do not kill. ([*Graham, supra,* 130 S.Ct.] at p. 2030.) As a practical matter, the consecutive life sentences the trial court imposed here denied Nuñez any possibility of receiving a parole hearing. We perceive no sound basis to distinguish *Graham*'s reasoning where a term of years beyond the juvenile's life expectancy is tantamount to an LWOP term."].).

Graham was sentenced to life imprisonment for armed burglary plus 15 years for attempted armed robbery. (*Graham, supra,* 130 S.Ct. at p. 2020). "Because Florida has abolished its parole system...a life sentence gives a defendant *no possibility of release* unless he is granted executive clemency." (*Ibid.* [italics added]). In

Florida, therefore, any life sentence necessarily results in life imprisonment with no possibility of parole. Graham's life sentence for non-homicide offenses violated the Eighth Amendment's prohibition against cruel and unusual punishment because it carried no possibility of release. (*Graham, supra,* 130 S.Ct. *at* p. 2034).

The fundamental difference between a life sentence that carries no possibility of release and one that does is that the goal of rehabilitation is rejected in the former. (*Solem v. Helm* (1983) 463 U.S. 277, 283-84.) "Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored." (*Graham, supra,* 130 S.Ct. at p. 2028.)

Rodrigo Caballero's sentence of 110 years to life is indistinguishable from Terrance Graham's because it too affords no possibility of parole. Excessive terms for teens like Petitioner (110 to life), Graham (life), Mendez (84 to life), Nunez (175 to life) and Ramirez (120 to life), provide no hope of release. Yet, these individuals are not beyond redemption:

> By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile

> nonhomicide offender's capacity for change and limited moral culpability.

(*Graham, supra,* 130 S.Ct. at p. 2030.)

The judgment of the Court of Appeal should be reversed because Rodrigo Caballero is serving a life term for non-homicide offenses with no possibility of release—the functional equivalent of life without possibility of parole.

III. Petitioner's Confinement is Identical to Those Sentenced to Life without Parole

It is also relevant that the terms and conditions of Petitioner's incarceration are virtually identical to others' serving life with no possibility of parole. No substantive differences exist. Punishment is akin to slow death, rehabilitation is abandoned and the judgment is irreversible. (*See Graham, supra,* 130 S.Ct. at p. 2030 ["For juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident."] [internal citations omitted].).

Life inmates are denied virtually all prison privileges regardless of parole eligibility. Most life prisoners like Petitioner are disqualified from obtaining good time/work time credits just as their

life-with-no-parole counterparts. (15 Cal. Code of Reg. §3042.)[6] At reception, both sets of inmates are placed in restricted secure housing units. (*Id.* at §3375.2.) Each is classified close custody and supervision during the first 15 years' confinement and has limited opportunities for reduction thereafter. (*Id.* at §3377.2.) Each is denied prison jobs and meager institutional programming because both life terms carry heavy classification scores and the availability of program resources at high-level security facilities is scarce. (*Id.* at §§3375.1, 3377.2.) Like others sentenced to life without possibility of parole, Petitioner's 110-year sentence brands him a "High Notoriety" inmate.[7]

Thus, Rodrigo's lifetime of harsh punishment is functionally equivalent to a prisoner's serving life with no possibility of parole. Each of the characteristics *Graham* identified in describing a "life without parole" sentence applies to Petitioner:

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[6] *Compare Rummel v. Estelle* (1980) 445 U.S. 263, 280-81 [Texas' relatively liberal policy of granting "good time" credits to its prisoners allows a prisoner serving a life sentence to become eligible for parole in as little as 12 years. Thus, a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life.]. Penal Code §2933.1(a) makes Petitioner ineligible from accumulating 50/50 credits others receive under §2933(b).

[7] "Bases for the High Notoriety designation include, but are not limited to, Execution Type Murder, Multiple Murders, mutilation of victims, an original sentence of Death, a sentence of Life Without the Possibility of Parole, a total term of 100 years or more." (15 Cal. Code of Reg. §3000.)

> [Y]et life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency— the remote possibility of which does not mitigate the harshness of the sentence. *Solem,* 463 U.S., at 300-301, 103 S.Ct. 3001. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.' *Naovarath v. State,* 105 Nev. 525, 526, 779 P.2d 944 (1989).

(*Graham, supra,* 130 S.Ct. at 2027.)

IV. Petitioner is More Deserving of Relief

Ironically, if, as the Court of Appeal contends, *Graham* only applies to minors who committed more egregious offenses and received penalties literally worded as "life with no possibility of parole," only the most culpable would receive any benefit. However, *Graham* is premised on proportional responsibility. Teens sentenced to a term of years-to-life with parole, such as Rodrigo, are less culpable than those sentenced to life without parole.[8] Parole should

[8] For example, under Penal Code §190.5 subdivision (b), a minor between the ages 16 and 18 convicted of first degree murder with special circumstances qualifies for life without the possibility of

therefore be extended to offenders like Petitioner who committed relatively less serious crimes.

All persons under 18 have limited culpability. That's why none can be sentenced to death. (*Roper v. Simmons* (2005) 543 U.S. 551.) Under *Graham*, however, minors who did not commit homicide, but cannot be paroled, are entitled to release because they have twice-diminished moral responsibility. (*Graham, supra,* 130 S.Ct. at p. 2027.) It therefore follows that juveniles who are sentenced to life with the possibility of parole are less culpable still. Since Petitioner didn't commit homicide, but received a life term that functionally guarantees he will not be paroled, his sentence should be vacated.

Rodrigo's use of a firearm causing great bodily injury is an aggravating circumstance, but it does not foreclose the right to parole because no one died. The victim survived relatively unscathed, joined a gang and testified at Petitioner's trial but could not identify Petitioner as the person who shot him. (RT 916, 961-974). A conviction for attempted murder is not homicide because, as the Court put it, Petitioner didn't cross the line:

> There is a line 'between homicide and other serious violent offenses against the individual.' *Kennedy,* 554 U.S., at ___, 128 S. Ct., at 2659-60. Serious nonhomicide crimes 'may be devastating in their harm . . . but "in terms of moral depravity and of the injury to the person

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parole. Under the Court of Appeal's ruling, minors who commit such killings would be entitled to parole consideration, but not Petitioner.

> and to the public," . . . they cannot be compared to murder in their "severity and irrevocability."' *Id.*, at ___, 128 S. Ct., at 2660 (quoting *Coker,* 433 U.S., at 598, 97 S. Ct. 2861 (plurality opinion)). This is because '[l]ife is over for the victim of the murderer,' but for the victim of even a very serious nonhomicide crime, 'life . . . is not over and normally is not beyond repair.' *Ibid.* (plurality opinion).

(*Graham, supra,* 130 S.Ct. at p. 2027.)

Even dissenting Justice Thomas acknowledged that *Graham* includes attempts: "The Court holds today that it is 'grossly disproportionate' and hence unconstitutional for any judge or jury to impose a sentence of life without parole on an offender less than 18 years old, unless he has committed a homicide." (*Graham, supra,* 130 S.Ct. at p. 2043 (dissent).) Recently, a justice of the Court of Appeal also rejected the argument that juveniles convicted of attempted murder are excluded from *Graham*'s remedy:

> I believe the Supreme Court intended its categorical rule to apply to juveniles convicted of attempted murder. I base this conclusion primarily on the language the court twice chose to express its holding . . . I further rely on the court's discussion of the line between homicide and other serious violent offenses against the individual. . . If *Graham* applies to a juvenile child rapist—as it clearly does—there is no rational basis for declining to apply it to someone like appellant, who attempted but failed to kill, and whose victims walked into court to testify.

(*People v. Ramirez, supra,* ____ Cal.App.4th ____ (March 16, 2011) (Slip opn. at pp. 6-7) (dis. opn. of Manella, J.) [internal quotations and footnote omitted].)

Petitioner's convictions for attempted murder do not disqualify him under *Graham.* The judgment of the Court of Appeal should therefore be reversed.

V. California's Rate of Incarcerating Juveniles for Life Is Disproportionate and Violates International Law

California's rate of incarcerating juvenile offenders for years-to-life sentences far outstrips any other State's rate or the federal government's rate. As of 2009, 6,807 minors were serving parolable life sentences nation-wide. More than one third—2,623—are imprisoned in California. The table below shows how disproportionate California's sentencing practice has become.

JUVENILE LIFE AND JLWOP POPULATION BY STATE

STATE	JUVENILE LIFE POPULATION	JUVENILE LWOP POPULATION	STATE	JUVENILE LIFE POPULATION	JUVENILE LWOP POPULATION
Alabama	121	89	Nebraska	68	29
Alaska	8	0	Nevada	322	69
Arizona	149	25	N.H.	15	4
Arkansas	58	57	New Jersey	17	0
California	**2,623**	239	New Mexico	30	0
Colorado	49	49	New York	146	0
Conn.	18	14	North Carolina	46	26
Delaware	31	19	North Dakota	3	1
Florida	338	96	Ohio	212	0
Georgia	6	0	Oklahoma	69	9

Hawaii	8	2	Oregon	14	0
Idaho	21	4	Pennsylvania	345	345
Illinois	103	103	Rhode Island	12	1
Indiana	0	0	South Carolina	55	14
Iowa	37	37	South Dakota	4	4
Kansas	64	0	Tennessee	179	12
Kentucky	101	6	Texas	422	3
Louisiana	133	133	Utah	Unk.	Unk.
Maine	0	0	Vermont	0	0
Maryland	269	19	Virginia	107	28
Mass.	52	22	Washington	56	28
Michigan	206	152	West Virginia	0	0
Minnesota	9	1	Wisconsin	67	2
Miss.	63	42	Wyoming	6	0
Missouri	87	35	Federal	52	35
Montana	6	1	Total	6,807	1,755

Notes: JLWOP is prohibited in Alaska, Colorado, Kansas, New Mexico, and Oregon. JLWOP was eliminated in Colorado in 2005, but does not apply retroactively. Therefore, the 49 youth who were sentenced before the 2005 law was enacted continue to serve JLWOP sentences. Utah officials did not provide data on life sentences. Illinois officials did not provide data on life sentences of LWOP sentences. 103 juvenile LWOP prisoners were confirmed through an independent report in 2008.

Source: The Sentencing Project, *No Exit The Expanding Use of Life Sentences in America* (July 2009) www.sentencingproject.org.

No doubt, California's large population partially skews the data. Also, homicide convictions are included. However, the rate of juveniles arrested for homicide in 2009 was merely 0.3% [182 of 58,555 felony juvenile arrests]. (Calif. Dept. of Justice, *Juvenile Justice in California*, Table 4, Juvenile Felony Arrests, 2009 (July 2010).) In 2009, 60 minors were convicted of homicide; 53 were imprisoned. (*Id.* at Table 31, Adult Court Dispositions for Felony Offenses, 2009.) It is unlikely rates of arrests and convictions have dramatically decreased over the past 20 years.

However adjusted, the numbers remain staggering. The data indicate the majority of California's prisoners who were sentenced as juveniles to life terms are serving sentences for non-homicide offenses. California is thus out-of-step with the rest of the nation and its treatment of juvenile offenders is anomalous. Actual sentencing practices, as the Court noted in *Graham*, help determine whether a consensus exists. (*Graham, supra,* 130 S.Ct. at p. 2023.) California's preference for committing non-homicide youthful offenders to life terms in numbers far exceeding all other states is a reliable indicator of non-conformity with the national practice.

Further, California's wholesale incarceration of minors for life terms without any meaningful chance of parole violates international law. (*Graham, supra,* 130 S.Ct. at p. 2033 ["The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But the climate of international opinion concerning the acceptability of a particular punishment is also

not irrelevant. The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual."] [internal citations omitted].).

The international prohibition against life without parole terms for minors, as well as other international principles, is relevant to whether a term of 110 years to life is cruel and unusual punishment. As evidence of customary law, *Graham* recognized that Article 37, subdivision (a) of the United Nations Convention on the Rights of the Child (*hereafter* "CRC"), "prohibits the imposition of 'life imprisonment without possibility of release...for offences committed by persons below eighteen years of age.'" *Graham, supra*, 130 S.Ct. at p. 2034. Thus, Petitioner's sentence of 110 years to life is proscribed by the CRC because there is no possibility of release. Moreover, the CRC's oversight committee recommends that "parties abolish *all* forms of life imprisonment for offences committed by persons under the age of eighteen. For all sentences imposed upon children the possibility of release should be realistic and regularly considered." (*See* Comm. on Rights of the Child, Children's Rights in Juvenile Justice, General Comment No. 10, U.N. Doc. CRC/C/GC/10 ¶77 (Apr. 25, 2007) (emphasis added).).[9]

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[9] "Given the likelihood that a life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release, the Committee strongly recommends the States parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18." (www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf.)

CRC Article 37, subdivision (b) provides that imprisonment be used only as a measure of last resort and for the shortest appropriate time. (*See* U.N. Convention on the Rights of the Child, GA Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (Nov. 20, 1989).). Consistent with international law, an irreducible sentence of life imprisonment cannot be imposed on a child in any European country. In fact, the majority of European countries do not allow life sentences to be imposed on children at all. (*See* Dirk Van Zyl Smit, "*Outlawing Irreducible Life Sentences: Europe on the Brink?*," 23 FEDERAL SENTENCING REPORTER, No. 1, pp. 39-48 (October 2010).).[10]

"Every member of the United Nations except the United States and Somalia has adopted the C[RC]. Soon, the United States will likely be the lone holdout, as Somalia has indicated its intention to

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[10] Maximum prison sentences or similar sanctions for youth in Europe vary from 3 years in Portugal, 4 years in Switzerland, 5 years in the Czech Republic, 10 years in Estonia, Germany and Slovenia and 20 years in Greece and Romania (in cases where life imprisonment is provided for adults) and even longer terms up to (theoretically) life imprisonment in England/Wales, the Netherlands or Scotland (in the latter cases restricted, however, to juveniles aged 16 or over). In general, the maximum is fixed at 10 years, sometimes allowing an increase of penalties of up to 15 years for very serious crimes. However, some countries such as Portugal and Switzerland do not authorize sentences longer than 3 to 4 years for very serious cases including murder. (Frieder Dunkel & Barbara Stando-Kawecka, *'Juvenile Imprisonment and Placement in Institutions for Deprivation of Liberty--Comparative Aspects,'* in JUVENILE JUSTICE SYSTEMS IN EUROPE--CURRENT SITUATION AND REFORM DEVELOPMENTS 1772 (F. Dunkel, et al., eds.) (2010).

adopt the Convention." (Pifer, *Is Life The Same As Death?: Implications of* Graham v. Florida, Roper v. Simmons, a*nd* Atkins v. Virginia *On Life Without Parole Sentences For Juvenile And Mentally Retarded Offenders,* 43 LOYOLA L. REV. 1495, 1524 (2010).)

Finally, the International Covenant on Civil and Political Rights specifies criminal procedures for juveniles should take into account their age and the desirability of promoting rehabilitation. (*See*, 999 U.N.T.S. 171, entered into force, Mar. 23, 1976, ratified by the United States, 1994, Article 14 (4).)

The most punitive justice system on the planet is in the United States, and California has the dubious distinction of leading all states in the frequency of imposing juvenile life terms. (Hartney, *US Rates of Incarceration: A Global Perspective,* Fact Sheet (2006) NATIONAL COUNCIL ON CRIME AND DELINQUENCY 2, 4; *and see Juvenile Life Sentencing Table, ante,* at pp. 20-21.) Rodrigo Caballero's sentence is representative of that trend, but his sentence is categorically unconstitutional because it forecloses all possibility of release.

VI. Functional Equivalence

The Court of Appeal dismissed without analysis the notion that Petitioner's sentence was the functional equivalent of life without possibility of parole. (*People v. Caballero, supra*, slip opn. at p. 18.) However, there is no difference between a life term for years and a sentence of life without possibility of parole if the former results in a lifetime of confinement. Functional equivalence has been applied broadly when a defendant's freedom is at stake. It has also marked the outer bounds of expanding constitutional rights in a variety of social contexts. Its application to expand Eighth Amendment rights to Petitioner's case is appropriate and illuminating.

In *In re Christie* (2001) 92 Cal.App.4th 1105, 1109, *opn. mod.* 93 Cal.App.4th 1158b, bail set at ten times the presumptive amount was deemed the functional equivalent of no bail at all. In *In re Jovan B.* (1993) 6 Cal.4th 801, 815, this Court held that terms of a minor's home release were the functional equivalent of adult own recognizance.

The concept of functional equivalence was applied to sentencing in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494, fn. 19. There, an enhancement that increased punishment beyond the statutory maximum was deemed the functional equivalent of a greater offense requiring proof beyond reasonable doubt. *Rhode Island v. Innis* (1980) 446 U.S. 291, 301, also cast a wide net by equating informal police conversation as the functional equivalent of express

interrogation likely to provoke an incriminating response subject to *Miranda*.

Finally, under the First Amendment, functional equivalence has been repeatedly invoked to expand rights of freedom of assembly, association and speech. For example, in *March v. Alabama* (1946) 326 U.S. 501, 506-507, the U.S. Supreme Court likened a company-owned town as the functional equivalent of a municipality for purposes of distributing religious literature. Similarly, this Court in *Robbins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 910, fn. 5, held a shopping center is the functional equivalent of a traditional town center.

These cases demonstrate functional equivalence is established in state and federal jurisprudence and is appropriate in the context of the Eighth Amendment. A sentence of life imprisonment for a minor convicted of non-homicide offenses when there is no genuine chance of release is the functional equivalent of a sentence of life without possibility of parole. (*See Sumner v. Shuman* (1967) 483 U.S. 66, 83 ["there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy."]). Both sentences guarantee death by incarceration without any "realistic opportunity to obtain release before the end of that term." (*Graham, supra*, 130 S.Ct. at p. 2034.) The U.S. Supreme Court has categorically rejected this outcome for prisoners who were juveniles at the time they committed

a non-homicide offense. (*Ibid.*) Accordingly, Petitioner's sentence should be vacated and the judgment of the Court of Appeal reversed.

VII. The Manner in Which Petitioner Was Sentenced Violates the Eighth Amendment

Immediately following the jury verdict, time for sentencing was waived and three consecutive life terms totaling 110 years to life were imposed only because of the rigid formulae prescribed by the Penal Code. The sentence was calculated without regard to Petitioner's mental illness, lack of prior record, or potential for growth and maturity. However, the U.S. Supreme Court has noted that "the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence." (*Sumner, supra,* 483 U.S. at p. 85.)

Juvenile offenders like Petitioner who are tried as adults are subject to mandatory sentencing schemes that foreclose consideration of parole and render the offender's personal circumstance irrelevant. This practice was deemed unconstitutional in *Graham* because, "[b]y denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile non-homicide offender's capacity for change and limited moral culpability." (*Graham, supra*, 130 S.Ct. at p. 2030.)

In *Mendez, supra,* 188 Cal.App.4th 47, a case that followed *Graham* but preceded Petitioner's, the court expressed concern with the practice of sentencing juvenile offenders to adult terms without

first determining the circumstances that brought the offender to justice:

> We are particularly troubled here by the fact that the record is silent as to Mendez's personal and family life and upbringing. This is important because the particular characteristics of the offender are relevant to the harshness of the penalty and a defendant's culpability. (*Nuñez, supra*, 173 Cal.App.4th at p. 735, citing *Edmund v. Florida, supra,* 458 U.S. 782.) The record is silent as to the reasons Mendez joined a gang in the first place, any drug use, mental health issues, educational level, etc. It may well be the case that there were mitigating factors that would diminish his culpability and expose the harshness of his sentence. But we simply have no such knowledge here. And it does not appear that the trial court had any such evidence before imposing consecutive sentences.

(*Mendez, supra,* at pp. 65-66.)

Rodrigo Caballero joined a gang just 6 months before the shooting. (RT 993). He had no prior felony convictions. There was no evidence Rodrigo had known or ever fought with the victims (RT 1209-10); neither gang claimed the "turf" where the shooting occurred (RT 1216); no evidence of the car ride leading up to the shooting was introduced; no weapon was recovered; and no evidence of how long Petitioner possessed a weapon was offered. The offense was spontaneous, impulsive, and inexplicable.

None of the competency evaluations was ever mentioned or considered in Superior Court. The onset of Petitioner's symptoms closely followed the offense, and it is likely that his mental disease

played a part. Evidence of Petitioner's mental disease should have been considered before such a draconian sentence was affirmed.

We are not advocating that children who commit serious offenses short of homicide should escape punishment. But in this case, a severely disturbed 16-year-old was sentenced to a lifetime of confinement without a realistic chance of parole. A reasoned judgment was not made at his sentencing. The sentence should be vacated and remanded with instructions to develop a comprehensive profile of mitigating and aggravating circumstances before sentence is imposed.

May 11, 2011

Respectfully submitted,

KOSNETT & DURCHFORT

By David E. Durchfort

Certification

In accordance with Cal. Rules of Court, R. 8.504(d), I certify this brief contains 6,644 words according to the word-count function of the program used to prepare it.

May 11, 2011

KOSNETT & DURCHFORT

By David E. Durchfort

PROOF OF SERVICE

CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 11355 W. Olympic Boulevard, Suite 300, Los Angeles, California 90064.

On the date set forth below, I caused the document(s) described as **Petitioner's Opening Brief On The Merits** to be served on interested parties in this action as follows:

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[X] **BY MAIL**–I caused such envelope(s) to be deposited in the mail at Los Angeles, California, with first class postage thereon fully prepaid. I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit.

[X] **STATE** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed May , 2011 at Los Angeles, California.

Juanita Teall