IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JESUS MANUEL RODRIGUEZ, et al., Defendants and Appellants.	Supreme Court No. S239713

STANISLAUS SUPERIOR COURT, Nos. 1085319 and 1085636
THE HONORABLE NANCY ASHLEY, JUDGE PRESIDING

REVIEW FROM THE 2016 DECISION ON DIRECT APPEAL OF THE
FIFTH APPELLATE DISTRICT, No. F065807

OPENING BRIEF ON THE MERITS

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ISSUES FOR REVIEW

By an April 12, 2017 Order, this Court established the following two questions as the issues to be briefed and argued:

"(1) Was the accomplice testimony in this case sufficiently corroborated? (See *People v. Romero and Self* (2015) 62 Cal.4th 1, 36.)

"(2) Is the defendant's constitutional challenge to his 50 years to life sentence moot when, unlike in *People* v. *Franklin* (2016) 63 Cal.4th 261, his case was not remanded to the trial court to determine if he was provided an adequate opportunity to make a record of information that will be relevant to the Board of Parole Hearings as it fulfills its statutory obligations under Penal Code sections 3051 and 4801?"

STATEMENT OF THE CASE

A May 26, 2004 drive-by gang shooting into a park resulted in a death; the appellants, fifteen-year-old Jesus Manuel Rodriguez ("Rodriguez"), and sixteen-year-old Edgar Barajas ("Barajas"), were arrested.[1] (C.T.2, pp. 528, 539 [Rodriguez was born on June 12, 1988, and Barajas on July 23, 1987].) Both were within the jurisdiction of juvenile court. (Welf. & Inst. Code, §§ 602, 603.)

On September 20, 2004, a juvenile fitness report was filed in In re Jesus Manuel Rodriguez, Juvenile Court case no. 506846. (2nd Supp. C.T.1, pp. 1-21.) Due solely to the nature of the charges, the report concluded Rodriguez was not a fit subject for juvenile court jurisdiction. (2nd Supp. C.T.1, p. 19.)

On December 14, 2004, Rodriguez's fitness hearing was held.[2] (Rough Draft #2, pp. 1-2; 4/23/13 R.T.1, pp. 1-27.) He was deemed not to be a fit subject for juvenile court jurisdiction due to his "criminal sophistication" and the circumstances and gravity of the offense. (Rough Draft #2, p. 2; C.T.1, pp. 1-2.) On December 16, 2004, Rodriguez was arraigned in Stanislaus County case no. 1085319. (2nd Aug. R.T.2, pp. 201-203.)

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[1] Accomplices Luis Acosta, Pedro Castillo and Rigoberto Moreno pled to lesser offenses in exchange for lesser sentences. (C.T.2, p. 546.) None testified at trial and none are joined on appeal.

[2] A settled statement of this hearing in lieu of the reporter's transcript was augmented to the record, consisting of a two-page summary (Rough Draft #2, pages 1-2), and a reporter's transcript of an April 23, 2013 settled statement hearing, pages 1-27. *See*, http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=5&doc_id=2026506&doc_no=F065807.

On December 23, 2004, Barajas's fitness hearing was held in Juvenile Court case no. 507371.[3] (C.T.1, pp. 7-8.) He too was deemed not to be a fit subject for juvenile court jurisdiction. (Ibid.) He was separately arraigned in Stanislaus County case no. 1085636.

Identical but separate Informations then charged Rodriguez and Barajas with premeditated first-degree murder (count 1) and conspiracy to commit murder (count 2), with special allegations that both offenses were committed on behalf of a criminal street gang, through a principal's personal and intentional discharge of a firearm causing great bodily injury; they both also were charged with active participation in a criminal street gang (count 3). (Pen. Code, §§ 182; 186.22, subds. (a) and (b)(1); 187, subd. (a); 12022.7; and 12022.53, subds. (d) and (e)(1).) (C.T.1, pp. 181-185, 188-193.)

The People's motion to join these cases for trial was granted. (C.T.1, pp. 198, 296.) On May 11, 2011, following a 15-day jury trial before the honorable Nancy Ashley, a single jury convicted Rodriguez and Barajas of all three counts as charged, finding all overt acts underlying the conspiracy and all special allegations "true." (C.T.2, pp. 501-506, 507-512; R.T.5, pp. 1205-1208.)

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[3] The appellate court denied Barajas's motion to augment the record with the transcript of this hearing, as it did not see "how the requested materials, regarding the juvenile court's 2004 unfitness determination under Welfare and Institutions Code section 707, may be useful in assessing the 2012 sentence imposed for possible Miller/Caballero error on appeal." (http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=5&doc_id=2026506&doc_no=F065807.)

Separate probation reports (C.T.2, pp. 528-548 [Rodriguez], 549-573 [Barajas]), both appellants' motions for new trials (C.T.3, 629-653, 654-686), and Rodriguez's opposition to his probation report (C.T.3, 771-774), were filed. At the September 4, 2012 sentencing hearing the motions were denied. (C.T.3, pp. 765, 766; R.T.5, pp. 1243-1244.) The court then imposed identical total terms of 50 years to life upon each appellant.[4] (R.T.5, pp. 1251-1252.)

Both appellants pursued direct appeals in Fifth Appellate District case no. F065807. On February 17, 2015, the appellate court rejected their challenges in an initial unpublished opinion, affirming their convictions and sentences. (People v. Rodriguez and Barajas (Feb. 17, 2015, F065807) [nonpub. opn.] at pp. 2, 25.)

Both petitioned for review. (Cal. Sup. Ct. dock. no. S225231.) On June 10, 2015, this Court granted review but deferred further action pending disposition of related issues in other cases.

On August 17, 2016, this Court ordered this matter transferred back to the Fifth Appellate District, "with directions to vacate its decision and reconsider the cause in light of *People* v. *Franklin* (2016) 63 Cal.4th 261, 269 as to defendant Rodriguez, and in light of *People* v. *Franklin* (2016) 63 Cal.4th 261, 269, and *People* v. *Romero & Self* (2015) 62 Cal.4th 1 as to defendant Barajas."

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[4] For count 1's first-degree murder the court imposed the mandatory term of 25 years to life with a mandatory, consecutive firearm enhancement of 25 years to life, and imposed but stayed a 10-year gang enhancement. It imposed but stayed subordinate terms on counts 2 and 3. (Pen. Code, § 654.) (R.T.5, pp. 1251-1252.)

On December 20, 2016, the Fifth Appellate District issued an amended unpublished opinion, again rejecting all challenges and affirming both appellants' convictions and sentences. (People v. Rodriguez and Barajas (Dec. 20, 2016, F065807) [nonpub. opn.] at pp. 2, 26.)

On January 24, 2017, Barajas filed a petition for rehearing.[5] On January 6, 2017, his petition was summarily denied.

STATEMENT OF APPEALABILITY

On January 26, 2017, Barajas timely filed another petition for review in this Court.[6] (Cal. Sup. Ct. dock. no. S239713.)

On April 12, 2017, this Court granted review, specifying the above-cited two issues as the matters to be briefed and argued.

On May 2, 2017, counsel were appointed for both appellants.

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[5] Rodriguez did not file a petition for rehearing.

[6] Rodriguez did not file a second petition for review. However, he raised the second issue granted review in his Opening Brief (Rodriguez AOB, § V, at pp. 85-98), formally joined Barajas's Opening Brief on that issue (Rodriguez's 7/18/13 Notice of Joinder, citing Barajas's AOB, § F, at pp. 81-88), supported that argument in his Reply Brief (Rodriguez ARB, § V, at pp. 20-24), and included that issue in his 2015 petition for review. (Rodriguez Rev. Ptn, dock. no. S225231, § V, at pp. 4, 28-33.)

STATEMENT OF FACTS

Gang investigator Froilan Mariscal testified the Surenos are a criminal street gang. (R.T.4, pp. 716-717, 726, 731-732.) At trial, self-admitted Sureno Mario Garcia[7] testified that in May, 2004 fellow Surenos included 15-year-old Rodriguez,[8] 16-year-old Barajas,[9] and 16-year-old Luis Acosta. (R.T.3, pp. 526-530, 537-540, 610-611; R.T.4, pp. 756-757, 812-813.)

Garcia and Acosta's houses were near Oregon Park. (R.T.3, pp. 502, 540, 610-611.) That park was well known as a Nortenos hangout; gang members played basketball there and wore red. Surenos never used the park; Garcia said it would have been "suicide" for him or any Southerners to do so. (R.T.1, pp. 107-108, 157-158; R.T.4, pp. 739-741.) Mariscal testified Garcia and Acosta's houses were considered Sureno "pockets" in Norteno territory. (R.T.4, p. 794.)

Between December 12, 2003 and May 20, 2004, Nortenos subjected Acosta, his family and his house to escalating and increasingly

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[7] Garcia was subject to the same charges in this case, but in exchange for his testimony he was allowed to plead to a single count of accessory after the fact, and was sentenced to serve seven years followed by eventual deportation. (R.T.3, pp. 590-591.)

[8] In November, 2003 Rodriguez told police he became a Sureno four or five months earlier, but ended the relationship one month earlier. (R.T.4, pp. 761-762, 787.) However, in a 2004 post-arrest statement to police, Rodriguez said he was a "southerner" (i.e., a Sureno), and had been for six months. (R.T.3, pp. 762-763.)

[9] Mariscal testified that in the four months before the shooting in this case, Barajas was involved in three gang-related issues at his school. (R.T.4, pp. 747-749.)

more frequent assaults, including repeated invitations to fight, graffiti defacement, a drive-by shooting and attacks with rocks, bottles, firearms and Molotov cocktails. The attacks culminated in an incident in which Acosta's arm and the windows of his van were broken, and a semi-automatic handgun was fired at him. (R.T.3, pp. 507, 543-544; R.T.4, pp. 769-770, 772-773.)

On May 25, 2004 Rodriguez, accompanied by Garcia, drove his Blazer past Oregon Park to Acosta's house. When Rodriguez parked, Nortenos broke the Blazer's windows with baseball bats. (R.T.3, pp. 499, 501-502, 548-552.)

Garcia admitted he wanted revenge, including killing Nortenos. (R.T.3, pp. 554-555.) He claimed the next day (May 26, 2004), he phoned Barajas about getting a gun; Barajas needed a ride to pick it up. According to Garcia, he and Rodriguez drove Barajas in the Blazer and obtained a Savage .22-caliber rifle. On the ride home they discussed getting revenge on Nortenos. (R.T.2, pp. 298-299; R.T.3, pp. 561-564, 568-569.)

With Rodriguez driving they picked up Rigoberto Moreno and Pedro Castillo, who sat in the front passenger seat with a blue rag over his face.[10] Garcia testified he sat by the broken rear window with Barajas in the rear cargo area holding the .22-caliber rifle. (R.T.3, pp. 571-576.) Garcia's understanding was that they were looking for, and were going to "get at" Nortenos. (R.T.3, p. 577.)

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[10] Mariscal testified that in January, 2004, Castillo had a fight with a Norteno, while Moreno is a self-admitted Sureno associate. (R.T.4, pp. 752-755, 758-760.)

Around 5:00 p.m. a number of people including Ernestina Tizoc were under a gazebo in Oregon Park. Nortenos in the basketball area wore red. (R.T.1, pp. 109-110, 113-116; R.T.2, pp. 222-223, 230, 340-342.) Tizoc was wearing a top the color of a fire engine. (R.T.1, p. 117; R.T.4, pp. 831-833.)

According to Garcia, he, Rodriguez and the others drove past the park looking for anyone, male or female, wearing red. At the gazebo they saw someone wearing red and thought it was a Norteno; they wanted revenge. (R.T.3, pp. 577-579.) Other people under the gazebo with Tizoc noticed a white Blazer with broken back windows circling the park, driving very slowly; its occupants were displaying a Sureno hand sign. (R.T.1, pp. 117, 122-123, 126-127; R.T.2, pp. 226-230.)

The Blazer drove around the park a second time and stopped right before an intersection. Someone in the back with a bandanna covering his face pulled out a gun and began shooting continuously toward the gazebo. (R.T.1, pp. 120, 128-129, 132-133, 152, 178.) According to Garcia it was Barajas, who shouted "*puro sur*" ("pure south"), before firing. (R.T.3, pp. 579-580.)

Tizoc, who was facing the basketball courts, was shot. Someone called 911 and the police. (R.T.1, pp. 187-188; R.T.2, pp. 243-244, 277-278, 344.) Tizoc died at the scene from a single gunshot wound to the heart and lung. (R.T.2, pp. 279-282, 437-438.)

The Blazer sped off after the firing stopped. (R.T.3, pp. 580-581.) Garcia testified they drove to Modesto talking about whether they "got one." (R.T.3, p. 583.) They separated, but reunited after

half an hour. Garcia did not know what happened to the gun, but testified Barajas phoned the friend who gave him that gun, and this friend drove all five of them to a ranch. (R.T.3, pp. 585-587.)

Police quickly established who certain suspects were. (R.T.2, pp. 282-285.) On May 27, 2004, Rodriguez was taken into custody. (R.T.3, pp. 325, 494-495, 498.) Officers found clothing with Sureno indicia, which Rodriguez admitted were his. (R.T.3, pp. 496-498; R.T.4, pp. 761-762.) He agreed he considered himself a Sureno, a "southerner." (R.T.3, p. 513.) While driving to the station he was advised of and waived Miranda rights. (R.T.3, pp. 498-499, 501.)

Rodriguez said the Blazer was his and Nortenos broke the front windshield and two side windows with a baseball bat. Before the shooting he and others agreed the "fucking Nortenos" "were going to pay." There was only one gun in the Blazer, which he himself put behind the back seat.[11] He was the driver; moments before the shooting the conversation in the Blazer was that a shooting was going to occur that night. While driving they passed the park and he saw Nortenos. (R.T.3, pp. 499-501.)

At the station Rodriguez was placed in an interrogation room and was reminded of his Miranda rights, which he again waived. (R.T.3, p. 501.) He then said they had no particular target(s) in mind, just any Norteno in general. (R.T.3, p. 509.)

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[11] At some point Rodriguez said Acosta was afraid the Nortenos who fire-bombed his house might do something else to him, and he needed a gun for protection. (R.T.3. pp. 514-515.) Rodriguez was supposed to drive to Acosta's house to show him the rifle, but they never got to Acosta's house because the drive took them past Oregon Park first. (R.T.3, pp. 517-521, 524.)

After the shooting he found shell casings in the Blazer and discarded them near an alley; he hid the .22-caliber rifle in some bushes in that alley, and parked his Blazer in Modesto. (R.T.3, pp. 502, 507-508.) Officers went to a dairy farm Rodriguez described and located the .22-caliber rifle. (R.T.2, pp. 325-326.)

Ammunition test-fired from it was compared to a slightly deformed bullet retrieved during Tizoc's autopsy. A firearms expert could say no more than that the autopsy bullet was consistent with the Savage rifle. (R.T.2, pp. 377-378.) Theoretically it could have been fired from thousands of other firearms. (R.T.2, pp. 392-393.)

The Defense Case

Three Nortenos -- brothers Nicholas and Jason Jones, and Anthony Quijas -- testified for the appellants because it was the right thing to do, knowing they could be killed by Nortenos for doing so. (R.T.4, pp. 863-864, 893-894, 896, 950.)

On May 26, 2004, all three were in the park while Tizoc was sitting under the gazebo. (R.T.4, pp. 868, 870, 897, 927-928.) Jason was armed and knew other Nortenos were as well, because of what happened to Rodriguez's car the night before. (R.T.4, p. 901, 922-923.) Nicholas saw the Blazer arrive. (R.T.4, pp. 871, 883.)

The first shots Quijas heard came from the park; he saw a Norteno fire up to seven shots with a .22-caliber handgun. The next shots came from the street where the Blazer was. (R.T.4, pp. 931-934.) The Jones brothers also heard shots coming from two directions: from the Blazer toward the park, and from one or two

Nortenos shooting at the Blazer from the back of the gazebo. (R.T.4, pp. 871-873, 897-898, 900, 904-905.) Tizoc was hit some time between the two sets of shots. (R.T.4, p. 936.)

Nicholas knew one of the Norteno guns was a .22-caliber, while Jason identified for police two Nortenos with .22-caliber firearms who might have shot Tizoc. (R.T.4, pp. 875, 953-954.)

In 2010 an accident reconstructionist positioned a mannequin in Oregon Park where Tizoc sat. (R.T.4, pp. 959-960.) With a rod in the mannequin to simulate the path of the bullet, laser beams established the fatal wound could have been fired from someone behind Tizoc, firing at the street. (R.T.4, pp. 961-964.)

ARGUMENT

I.

THE FIRST ISSUE GRANTED REVIEW IS MOOT AS TO RODRIGUEZ, AS GARCIA'S ACCOMPLICE TESTIMONY WAS CORROBORATED BY RODRIGUEZ'S OWN STATEMENTS TO POLICE

Accomplice Garcia testified at trial, incriminating Rodriguez. (R.T.3, pp. 526-694.) Penal Code section 1111 requires accomplice testimony be corroborated. The first issue granted review asks whether accomplice testimony here was sufficiently corroborated, in accordance with People v. Romero and Self (2015) 62 Cal.4th 1, 36.

This issue is moot as to Rodriguez.[12] After his arrest he was twice advised of his Miranda rights and twice waived them. (R.T.3, pp. 498-499, 501.) His statements were introduced against him at trial and his admissions corroborated Garcia's testimony, that he (Rodriguez) was a Sureno; that the Blazer used in the drive-by shooting was his, and that he was the driver that night; that he himself put a gun behind the back seat; that he and others agreed Nortenos "were going to pay" for breaking the Blazer's front windshield and two side windows; that they targeted any Norteno in general; and that moments before the shooting the conversation in

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12 Rodriguez did not raise the issue of accomplice corroboration in the court of appeal; only Barajas did. Indeed, in its first grant of review in this case, this Court remanded this matter to the appellant court with the very specific direction to reconsider the cause in light of Romero and Self only as to Barajas. (Cal. Sup. Ct. dock. no. S225231, Order of 8/17/16.)

But the order granting this second review was not similarly specific. (Cal. Sup. Ct. dock. no. S239713, Order of 4/12/17.) Rodriguez therefore includes this section to explain why the first issue granted review does not apply to him.

the Blazer was that a shooting was going to occur that night. (R.T.3, pp. 496-501, 509, 762-763; R.T.4, pp. 761-762.)

These admissions established Rodriguez's aiding and abetting count 1 murder, his agreement with count 2 conspiracy and one overt act in support of it, the "principal armed" enhancement attached to counts 1 and 2, part of the requisite elements for count 3 gang participation, and gang enhancements attached to counts 1 and 2.

Accordingly, Garcia's accomplice testimony as to Rodriguez was corroborated as required by Penal Code section 1111 and People v. Romero and Self, *supra*, 62 Cal.4th 1.

II.

AS THIS CASE WAS NOT REMANDED FOR A TRIAL COURT DETERMINATION THAT RODRIGUEZ AND BARAJAS WERE ALLOWED TO MAKE AN ADEQUATE RECORD FOR FUTURE PAROLE REVIEW, THEY HAD NO *MEANINGFUL* OPPORTUNITY TO DEMONSTRATE MATURITY, REHABILITATION AND FITNESS TO REENTER SOCIETY, THUS THEIR EIGHTH AMENDMENT CHALLENGES TO THEIR CURRENT SENTENCES ARE NOT MOOT; IN THE ABSENCE OF REMAND, THEY WILL BE DENIED THEIR EIGHTH AMENDMENT RIGHTS TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENT AND THEIR FOURTEENTH AMENDMENT DUE PROCESS RIGHTS TO MAKE A RECORD AFTER SUFFICIENT NOTICE

The Eighth Amendment prohibits cruel and unusual punishment. (U.S. Const., Amend. VIII.) It encompasses a foundational principle that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." (Miller v. Alabama (2012) 567 U.S. 460, 474 [132 S.Ct. 2455, 183 L.Ed.2d 407] (hereinafter "Miller").) This prohibition is binding on the states through the Fourteenth Amendment. (Robinson v. California (1962) 370 U.S. 660, 667 [82 S.Ct. 1417, 8 L.Ed.2d 758].)

Rodriguez and Barajas were, respectively, 15 and 16 years old when they committed the May 26, 2004 offenses for which they were sentenced to mandatory terms of 50 years to life. (R.T.5, p. 1251.) In the court of appeal, citing Miller and other authorities, both argued their sentences are the functional equivalent of life without parole, an unconstitutionally cruel and unusual punishment for a child. (Rodriguez AOB, § V, at pp. 85-98; Barajas AOB, § F, at pp. 81-88; Rodriguez's 7/18/13 Notice of Joinder in Barajas's AOB, § F; Rodriguez ARB, § V, at pp. 20-24.)

Certain post-sentencing reforms now entitle both to youthful offender parole review hearings (which must give great weight to

youth-related mitigating factors), during their 25th years of incarceration. (Pen. Code, § 3051, subd. (b)(3).) This Court has held an identical Eighth Amendment challenge under Miller was mooted by enactment of section 3051. (People v. Franklin (2016) 63 Cal.4th 261, 280 (hereinafter "Franklin").) In light of Franklin, the court of appeal concluded Rodriguez and Barajas's Eighth Amendment challenges similarly were mooted by section 3051. (People v. Rodriguez and Barajas (Dec. 20, 2016, F065807) [nonpub. opn.], at p. 25.)

This case is on all fours with Franklin, with one exception: in Franklin the case was remanded to the trial court to ensure the defendant was "afforded an adequate opportunity to make a record of information that will be relevant to the Board" at his future parole review hearing. (Franklin, *supra*, 63 Cal.4th at pp. 286-287.) By contrast, the court of appeal here decided remand was unnecessary. (People v. Rodriguez and Barajas (Dec. 20, 2016, F065807) [nonpub. opn.], at p. 25.)

As will be established below, the reviewing court was wrong. Although enactment of section 3051 provides a bare *opportunity* for Rodriguez and Barajas to obtain early parole, absent a remand to allow them to put relevant information on the record they will be denied a *meaningful* opportunity to obtain early parole, so their Eighth Amendment challenges under Miller are not moot. Moreover, in the absence of an opportunity to make a full record of relevant information *after notice that they should do so*, they will be denied their Fourteenth Amendment procedural due process rights.

A. The History of This Case, Including Changes In Juvenile Sentencing Before and After Sentencing and Direct Appeal

Although the offenses in this case took place in mid-2004, Rodriguez and Barajas were not sentenced until mid-2012. Moreover, the instant proceeding is the second grant of review in the same direct appeal, so this Opening Brief is being filed thirteen years after the 2004 fitness reports and juvenile court proceedings. To answer the second question granted review, one must bear in mind the evolution in juvenile sentencing which began one year after the 2004 underlying offenses.

1. **2004: Rodriguez's Minimal Prior Juvenile History, the Petitions Against Him, His Fitness Hearing Report and the Juvenile Court Order**

Rodriguez was born on June 12, 1988. (C.T.2, p. 528.) On January 7, 2004, while he was 15 years old, he drove a stolen vehicle and was declared a ward of the Stanislaus County juvenile court. (2nd Supp. C.T.1, p. 17.) On March 9, 2004 he violated probation by repeated truancies from school. (Ibid.) On May 25, 2004, a Welfare and Institutions Code section 602 petition was filed alleging he committed the vehicle theft. (2nd Supp. C.T.1, p. 1.) The next day, May 26, 2004, the drive-by shooting and murder underlying this case occurred; on June 1, 2004, a second section 602 petition was filed alleging he committed those crimes. (Ibid.)

The probation office was required "to investigate and submit a report on the behavioral patterns and social history of the

minor" to the juvenile court. (Welf. & Inst. Code, § 707, subd. (c).) Rodriguez could submit "any other relevant evidence," but by statute was "presumed to be not a fit and proper subject for juvenile court unless the evidence shows extenuating or mitigating circumstances." (Ibid.)

On September 20, 2004 the fitness hearing report was filed in In re Jesus Manuel Rodriguez, juvenile court case no. 506846. (2nd Supp. C.T.1, pp 1-21.) The report noted Rodriguez by then was 16 years of age. (2nd Supp. C.T.1, p. 1.)

The recitation of charges and summary of evidence (including both the March, 2004 as well as May, 2004 offenses), took up two-thirds of the report. (2nd Supp. C.T.1, pp. 1-15.) By contrast, the social study was just one and one-half pages long. (2nd Supp. C.T.1, pp. 15-16.)

In summary the report recognized Rodriguez was doing well in juvenile hall and showed he could be rehabilitated prior to expiration of Juvenile Court jurisdiction. (2nd Supp C.T.1, pp. 19-20, ¶ 2.) In that regard he was a fit and proper subject for Juvenile Court. (2nd Supp C.T.1, p. 20, ¶¶ 3, 4.) But the report had to acknowledge the statutory presumption of unfitness. (2nd Supp C.T.1, p. 17.) Solely in light of the charges it had to conclude he was not a fit subject for juvenile court. (2nd Supp. C.T.1, pp. 17, 19, ¶¶ 1, 5; *see also*, 2nd Supp. C.T.1, p. 21.)

On December 14, 2004, a fitness hearing was held. (Settled Statement Rough Draft #2, p. 1.) Rodriguez called four witnesses, including police officers and the author of the fitness report. All

testified he "was cooperative, forthright, and helpful about his involvement throughout the investigation, that he had confessed fully, and that he appeared to be remorseful and generally seemed to lack sophistication." (Ibid.) But the juvenile court judge decided there were no extenuating or mitigating circumstances and found Rodriguez unfit for juvenile court jurisdiction. (Ibid.)

2. 2005 to June, 2012: The United States Supreme Court Invalidates the Death Penalty For All Juvenile Offenders Under 18 Years of Age, Life Without Parole For Nonhomicide Juvenile Offenders Under 18 Years of Age, and Automatic LWOP Sentences for Juveniles

In Roper v. Simmons (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1] (hereinafter "Roper"), the United States Supreme Court held the Eighth Amendment requires rejection of the death penalty for juvenile offenders under 18 years of age. (Id., at pp. 568, 578-579.) The high court found "[t]hree general differences between juveniles under 18 and adults" which demonstrate juvenile offenders "cannot be classified among the worst offenders." First, a "lack of maturity and an underdeveloped sense of responsibility" which "often result in impetuous and ill-considered actions and decisions"; second, vulnerability or susceptibility "to negative influences and outside pressures, including peer pressure"; and third, "that the character of a juvenile is not as well formed as that of an adult." (Id., at pp. 569-570.)

As a result, a juvenile's "irresponsible conduct is not as morally reprehensible as that of an adult," thus juveniles "have a