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. 5110301
The Honorable Leslie Landau, Judge

RESPONDENT'S BRIEF ON THE MERITS

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ISSUES

1. Did defendant's sentence of 50 years to life for a homicide committed when he was a juvenile violate the Eighth Amendment?

2. Was the first issue rendered moot by the enactment of Penal Code section 3051?

STATEMENT

1. Trial Evidence

On January 10, 2011, defendant's older brother told him that their younger brother Terrell was just jumped by kids from Crescent Park, a high-rise complex in Richmond. (2 RT 320-321, 350, 379.) Defendant had friends drive him to Crescent Park, but not to any particular residence. (2 RT 322-325, 379, 382.) They saw Gene G. walking on the street. (2 RT 327.) Defendant asked that the car door be unlocked, and a companion asked, "Why we ride up on Gene when he don't got nothing to do with the situation?" Defendant responded something like, "It don't matter. He's from the Crescents." (2 RT 330, 386.)

Defendant got out, pulled a gun from his waistband as he walked around the car, shot Gene several times before reaching him. Witness observed no intervening conversation between the two, and defendant kept firing as Gene tried to crawl away. (2 RT 274-281, 331-332, 334-335, 389, 391; 4 RT 788-885.) Sixteen-year-old Gene was later pronounced dead at the scene with multiple shots to the head and body. (2 RT 244-247, 485-486; 3 RT 539-544; 4 RT 530.) Defendant got back in the car, and said, "That Crescent Park dude is a sucker." (2 RT 336, 337; 3 RT 568.) When arrested, defendant denied involvement in any shooting. (4 RT 911-912.)

Defendant testified that he and the Crescent City gang had fights, and that he believed the gang had shot at his house on earlier occasions. (3 RT 616, 621.) Defendant was not specifically angry with Gene, a former friend

whom he had not seen for some time. (3 RT 617-620.) Defendant shot Gene knowing he was not responsible for his brother's beating and with no reason to believe Gene was responsible for the shots fired at his home, apart from Gene's association with the Crescent Park gang. (3 RT 654, 657, 766.)

2. Verdict and Sentence

A jury convicted defendant of first degree murder. The jury also found that defendant personally used and discharged the firearm that caused death (Pen. Code, §§ 187, 12022.53, subds. (b)-(d), further statutory citations are to this code unless otherwise specified). (5 RT 1101; 2 CT 411-412.)

At sentencing on May 25, 2012, the trial court rejected defendant's argument that the Eighth Amendment to the United States Constitution precluded a sentence of de facto life imprisonment without parole in his case. The court stated: "If there's ever been a record of a young person who had multiple opportunities to stopping violence and didn't, and escalated and escalated, this is it. And I don't think that under the circumstances of this case that there is an Eighth Amendment argument to made under the law as it stands today." (5 RT 1112.) The court sentenced defendant to 25 years to life on the murder, and a consecutive 25-years-to-life term for the use of the firearm that caused death (§§ 190, subd. (a), 12022.53, subd. (d)). (5 RT 1017.)

3. Eighth Amendment Claim on Appeal

Defendant appealed. His claims included the issue reserved in footnote 4 of *People v. Caballero* (2012) 55 Cal.4th 262, 268 (*Caballero*).[1]

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[1] After defendant's case was decided by the Court of Appeal, *People v. Guttierrez* (2014) 58 Cal.4th 1354, applied *Miller v. Alabama* (2012) 567 (continued...)

Defendant argued that *Caballero*'s application of *Miller v. Alabama*, *supra*, 567 U.S. ___ [132 S. Ct. 2455] and *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), to prohibit mandatory term-of-years sentences that amount to the "functional equivalent" of life without opportunity for parole (LWOP) for a juvenile's nonhomicide offense, also bars a mandatory 50-years-to-life term for a juvenile's homicide offense. (See Ct.App. Typed Opn. pp. 1, 15, fn. 4.)

The People contested defendant's contention that his sentence was the functional equivalent of LWOP and that the sentence was imposed in violation of the Eighth Amendment. (Ct.App. Typed Opn. p. 15, fn. omitted.) The People argued further that "any need for resentencing has been eliminated by the recent enactment of Senate Bill No. 260 which cured any constitutional infirmity." (*Ibid.*, fn. omitted.)

4. Court of Appeal Opinion

The Court of Appeal found that Penal Code section 3051, enacted by Senate Bill No. 260 (Reg. Sess., 2013-2014) and effective January 1, 2014, rendered defendant's Eighth Amendment claim moot. (Ct.App. Typed Opn. p. 15.) The court observed that under the sentence imposed, defendant would first become eligible for parole in 2060 or 2061, at the age of 66, that is, 50 years after he committed the murder at age 16. (*Id.* at p. 16.) It declined to decide whether the sentence, in view of defendant's life expectancy, "is the functional equivalent of an LWOP sentence." (*Id.* at p. 17.)[2] The court "assume[d], without deciding, that the sentence, when

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(...continued)
U.S. ___ [132 S. Ct. 2455], to a sentence of statutory life without possibility of parole for special circumstance murder by a juvenile offender.

[2] At defendant's request, the Court of Appeal took judicial notice of documents from the Centers for Disease Control and Prevention containing life expectancy data. (Ct.App. Typed Opn., p. 17, fn. 5.)

(continued...)

imposed, violated the Eighth Amendment and that had there been no intervening developments, remand for resentencing would have been required." (*Ibid.*)

The court construed newly enacted section 3051 as legislatively "setting the eligibility date for juvenile offenders sentenced to a term of 25 years to life or greater," and, hence, found that defendant "will be eligible for a youth offender parole hearing during his 25th year of incarceration." (Ct.App. Typed Opn. p. 18, fn. 6.) The Court of Appeal concluded 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." (*Id.* at p. 22.) The court awarded defendant an additional 502 days of presentence credits and affirmed the judgment. (*Ibid.*)

5. Grant of Review

This court granted defendant's petition for review and deferred briefing pending the disposition of *In re Alatriste,* S214652 and *In re Bonilla*, S214960. Subsequently, the court directed briefing on the questions stated above.

(...continued)

The court did not deem the data controlling on any issue, nor assessed the appropriate means of calculating natural life expectancy. (Ct.App. Typed Opn. p. 17.) The court stated: "In *People v. Perez* (2013) 214 Cal.App.4th 49, 57-58, the court recognized that there is no bright line defining '[h]ow much life expectancy must remain at the time of eligibility for parole" to satisfy constitutional concerns, but concluded that there must be at least "time left for [a defendant] to demonstrate, as the *Graham* court put it, 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" (Ct.App. Typed Opn. p. 17.)

SUMMARY OF THE ARGUMENT

Defendant's Eighth Amendment claim is moot. California eliminated de facto sentences of life without parole for most juvenile offenders, including defendant, by enacting Penal Code section 3051 and amending section 3046 as a legislative response to this court's decision in *Caballero*.

Notwithstanding the original sentence imposed by the trial court of 50 years to life in prison, the Court of Appeal correctly concluded that defendant is entitled to a hearing to determine if he should be released on parole after he serves 25 years in prison. As a result, defendant no longer serves a sentence arguably equivalent to life in prison without the possibility of parole.

Defendant does not dispute that his case falls within the scope of section 3051 and that an indeterminate life term with 25 years until parole eligibility does not violate his Eighth Amendment rights. (AOB 32.) Indeed, the relief defendant seeks is a remand to allow the court to consider a sentence of 25 years to life in prison. (AOB 11.) Thus, the intervening action by the Legislature in Senate Bill No. 260 renders the Eighth Amendment claim moot in this case and, indeed, for most offenses.

Irrespective of whether defendant's constitutional issue is moot, a mandatory sentence of 50 years to life for defendant's conviction of first degree murder with personal use of a firearm does not violate the Eighth Amendment under this court's decisions applying *Graham* and *Miller*. Defendant's sentence as imposed by the trial court provides him a meaningful opportunity for release within his natural life expectancy.

Should this court conclude that defendant's 50-years-to-life term is a de facto LWOP sentence, the case should be remanded to the trial court to determine whether defendant's offenses reflect his irreparable corruption within the meaning of *Miller*. If the court does not so conclude, it should determine a parole eligibility date within defendant's expected lifetime.

ARGUMENT

I. BY THE INTERVENING ENACTMENT OF SENATE BILL NO. 260, DEFENDANT IS NOW ELIGIBLE FOR PAROLE CONSIDERATION AFTER 25 YEARS OF IMPRISONMENT, RENDERING MOOT THE CLAIM OF CONSTITUTIONAL INFIRMITY IN THE SENTENCE

Defendant claims that his sentence of 50 years to life in prison is the functional equivalent of LWOP. He asserts that absent eligibility for parole earlier than 50 years, the sentence is precluded by the federal Constitution's Eighth Amendment because he was a juvenile when he committed the murder. He asserts that the trial court must determine a constitutionally-compliant term of years to parole eligibility release. That claim is moot.

In enacting Senate Bill No. 260, the Legislature created a new parole eligibility mechanism for juvenile offenders like defendant, who are sentenced to lengthy terms in prison. The legislation permits such juveniles to demonstrate their readiness for parole after a prescribed term of confinement lower than the previously imposed sentence and caps the maximum number of years to be served until parole eligibility at 25 years.

Senate Bill No. 260 mandates more than a parole hearing for youthful offenders serving lengthy sentences in prison. It allows such cases to be assessed in the context best suited to evaluating the individual offender's level of maturity and judgment, efforts at rehabilitation, and all other factors relevant to the ultimate decision whether the offender's reintegration into the community threatens further harm to society.

Senate Bill No. 260 has eliminated mandatory term-of-years sentences approximating life without possibility of parole for nearly all juvenile offenders in this state. Defendant's claim has been rendered only theoretic, and the judgment of the Court of Appeal should be affirmed on that basis.

A. Section 3051 Limits the Time That Juvenile Offenders Like Defendant Serve in Custody Prior to a Parole Hearing to a 25 Years Maximum, Curing Any Eighth Amendment Infirmity in the Original Sentence

The Supreme Court in *Graham*, *supra*, 560 U.S. 48, categorically barred under the Eighth Amendment a court's imposition of an LWOP sentence on a juvenile offender convicted of nonhomicide offenses. The court explained that juveniles, by reason of their immaturity, are less culpable for their criminal actions than their adult counterparts. (*Id.* at p. 68.) Given the transient nature of juveniles' immaturity, the court expressed concern at the difficulty of identifying the "irreparable corruption" typically needed to justify an LWOP sentence. (*Ibid.*) The high court also recognized that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." (*Id.* at p. 69.) In light of those considerations, the court determined that sentencing juveniles to the "'second most severe penalty permitted by law'" could not be justified by legitimate penological goals in nonhomicide cases. (*Id.* at p. 69, quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (conc. opn. of Kennedy, J.).)

Graham itself made clear the limits of the court's holding, namely, that a "[s]tate 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*, 560 U.S. at p. 82.) The high court directed that "[i]t is for the [s]tate, in the first instance, to explore the means and mechanisms for compliance" with this requirement. (*Id.* at p. 75.) The court did not say the required "means and mechanisms" are limited to judicial sentencing.

Two years later, in *Miller*, *supra*, 132 S.Ct. 2455, the Supreme Court revisited LWOP sentences for juveniles, this time in the context of a

conviction for murder. Initially, the high court clarified that *Graham*'s "flat ban" on LWOP sentences for juveniles applies only to nonhomicide cases. (*Id.* at p. 2465.) Recognizing, however, the force of *Graham*'s insistence that "youth matters" when considering whether a juvenile should be denied any opportunity for release (apart from clemency) from the outset of his sentence, *Miller* held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." (*Id.* at p. 2469.) The court explained that mandatory LWOP poses a great risk of disproportionality by making all age-related considerations irrelevant to the imposition of these stringent and irrevocable sentences. (*Ibid.*) While the court expressly refused to invalidate LWOP sentences for juveniles, *Miller* demanded that sentencing courts considering LWOP sentences "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Ibid.*)

Shortly after *Miller*, the court in *Caballero*, *supra*, 55 Cal.4th 262 considered a mandatory term-of-years sentence not constituting actual LWOP. *Caballero* struck down mandatorily consecutive terms aggregating to a 110-years-to-life sentence for three nonhomicide offenses by a 16-year-old defendant, on the ground that the 110-year term transgressed *Graham*'s "flat ban." (55 Cal.4th at p. 268.) This court reasoned that "[a]lthough the state is by no means required to guarantee eventual freedom to a juvenile convicted of a nonhomicide offense, *Graham* holds that the Eighth Amendment requires the state to afford the juvenile offender a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," and that "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." (*Id.* at p. 266, quoting *Graham*, *supra*, 560 U.S. at p. 73.) "'*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as

its categorical bar relates only to nonhomicide offenses." (*Caballero*, *supra*, at p. 267, quoting *Miller*, *supra*, 132 S.Ct. at p. 2465.) Pursuant to *Graham*, *Caballero* held that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*Id.* at p. 268.)

Caballero emphasized that its holding must be understood in the context of "*Graham*'s analysis, [which] *does not focus on the precise sentence meted out.* Instead, as noted above, it holds that a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime." (55 Cal.4th at p. 268, quoting *Graham*, *supra*, 560 U.S. at p. 82, italics added.) Echoing *Graham*'s invitation to the states to explore "means and mechanisms" of complying with its Eighth Amendment requirement, the court in *Caballero* resolved that legislative action could meet the state's requirement to provide realistic opportunity for parole in such cases: "We urge the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity." (*Caballero*, at p. 269, fn. 5.) Like the United States Supreme Court, this court did not suggest in *Caballero* that only a judicial "mechanism" will do. It would be strange if it had, since parole eligibility determinations are traditionally administrative in nature.

The California Legislature took heed of this court's recommendation. On September 16, 2013, the Governor signed into law Senate Bill No. 260. The bill established a parole eligibility mechanism for juvenile offenders with life sentences in both nonhomicide and homicide cases. In so doing, the state responded directly to the expressions in *Miller*, *Graham*, and

Caballero that the deprivation of a court's ability to consider the offender's youthfulness before imposing LWOP or functional equivalents risks significant sentence disparity that violates the Eighth Amendment.

Section 1 of Senate Bill No. 260 states, in pertinent part:

> The Legislature finds and declares that, as stated by the United States Supreme Court in *Miller v. Alabama* (2012) 183 L.Ed.2d 407, "only a relatively small proportion of adolescents" who engage in illegal activity "develop entrenched patterns of problem behavior," and that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," including "parts of the brain involved in behavior control." The Legislature recognizes that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262 and the decisions of the United States Supreme Court in *Graham v. Florida* (2010) 460 U.S. 48, and *Miller v. Alabama* (2012) 183 L.Ed.2d 407.

(Stats. 2013, ch. 312, § 1.)

Effective January 1, 2014, Senate Bill No. 260 added new section 3051. That section establishes parole eligibility dates for juvenile offenders based on the length of the sentence imposed for the "controlling offense," defined as "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." (§ 3051, subd. (a)(2)(B).) As relevant to this case, the section provides:

> A person who was convicted of a controlling offense that was committed before the person had attained 18 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.

(§ 3051, subd. (b)(3), as amended by Stats. 2013, ch. 312, § 4.)[3]

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[3] This provision is similar to those enacted by other states which have "new statutes have allowed parole eligibility for juveniles sentenced to long prison terms for homicides to begin after fifteen or twenty-five years of incarceration." (*State v. Null* (Iowa 2013) 836 N.W.2d 41, 72; see also *id.* at fn. 8 [collecting statutes; see, e.g., Del. Code Ann. tit. 11 § 4209A (Westlaw current through 79 Laws 2013, chs. 1–61) [providing the possibility of parole eligibility to juveniles convicted of first-degree murder after twenty-five years]; N.C. Gen. Stat. Ann. § 15A –1340.19A (Westlaw current through S.L.2013–128, 130–144 of the 2013 Reg. Sess.) [providing parole eligibility for juveniles convicted of first-degree murder after twenty-five years imprisonment]; 18 Pa. Cons.Stat. Ann. § 1102.1(a) (Westlaw current through Reg. Sess. Act 2013–11) [providing parole eligibility for juveniles age fifteen and older convicted of homicide after thirty-five years and for those under fifteen years of age after twenty-five years]; Utah Code Ann. §§ 76–5–202(3)(e), 76–3–207.7 (Westlaw current through 2013 Gen. Sess.) [providing that juveniles convicted of first-degree murder are eligible for parole after serving twenty-five years]; Wyo. Stat. Ann. § 6–10–301(c) (Westlaw current through 2013 Gen. Sess.) [providing parole eligibility for juveniles convicted of first-degree murder after twenty-five years imprisonment]; see also H.R. 1993, 89th Gen. Assem., Reg. Sess. (Ark. 2013) [amending Arkansas Code section 5–10–101(c) to provide that juveniles convicted of first-degree murder may be sentenced to life in prison without possibility of parole for twenty-eight years]; H.R. 152, 2013 Reg. Sess. (La. 2013) [providing, in newly enacted section 15.574.4(E) of Louisiana Revised Statutes, the possibility of parole eligibility for juveniles convicted of first or second-degree murder after thirty-five years imprisonment]; L. 44, 103d Leg., 1st Sess. (Neb. 2013) [giving a trial court discretion to impose a term-of-years sentence ranging from forty years to life after considering specific factors related to youth]; S. 239, 2013 Leg. Assem., 88th Sess. (S.D. 2013) [granting a trial court discretion to impose a sentence less than life without parole on a juvenile convicted of first or second-degree murder following consideration of specific factors related to youth and providing that life without parole "should normally be reserved for the worst offenders and the worst cases"].)

Senate Bill No. 260 also amended section 3046 to exempt juvenile offenders from the rule that prisoners sentenced to consecutive life sentences must serve their full consecutive terms before becoming eligible for parole. (§ 3046, subds. (a)-(c), as amended by Stats. 2013, § 3.)[4] Accordingly, juvenile offenders such as defendant are eligible for parole determinations under the provisions of Senate Bill No. 260 regardless of any consecutive terms of years.[5]

B. Defendant's Case Comes Within Section 3051

Defendant was 16 years old when he committed the instant murder in January 2011. He was sentenced to 25 years to life for the first degree murder and to a consecutive 25-years-to-life term for the firearm enhancement, for a total sentence of 50 years to life in state prison.

Defendant was not sentenced pursuant to the Three Strikes law, Jessica's Law, or to life without the possibility of parole. We do not assert his subsequent commission of any crime involving either malice or a life term sentence. Thus, this case comes within section 3051.

Defendant received the same sentence for the murder and the gun enhancement—25 years to life. Either of those two terms can serve as the "controlling offense" for purposes of section 3051, subdivision (a)(2)(B).

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[4] *Caballero* relied on former section 3046, subdivision (b) to determine the juvenile's parole eligibility date. Under amended section 3046, Caballero would not be subject to a minimum term of 110 years until parole eligibility, as consecutive sentences no longer establish the number of years the offender is required to serve until a parole determination.

[5] Section 3051 does not apply to inmates who were sentenced pursuant to the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12) or Jessica's Law (§ 667.61), or "to life in prison without the possibility of parole." (§ 3051, subd. (h).) It also does not apply "to an individual to whom this section would otherwise apply, but who, subsequent to attaining 18 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison." (*Ibid.*)

Because the sentence on the controlling offense is 25 years to life in prison, the Court of Appeal correctly found that defendant is eligible for release on parole during his 25th year of incarceration pursuant to section 3051, subdivision (b)(3). A sentence of 25 years to life, with parole eligibility at age 41, "by no stretch of the imagination" could be characterized as a "'functional' or 'de facto' LWOP, and therefore neither *Miller*, *Graham*, nor *Caballero* apply." (*People v. Perez*, *supra*, 214 Cal.App.4th at p. 58.)

Pursuant to section 3051, defendant will have a youth offender hearing in the 25th year of his incarceration. At that time, he will have a meaningful opportunity to obtain release based on a showing of his demonstrated maturity and rehabilitation. Defendant's life sentence is stringent, as it should be for a first degree murderer. But the 50-year term until a parole determination is no longer a component of his life sentence, let alone a mandatory component of it. The state is effectively barred from withdrawing the parole hearing guaranteed by Senate Bill No. 260, consistent with due process and ex post facto limitations on intervening legislation that increases penalties for past conduct. Thus, an irrevocable term of 50 years' imprisonment without parole no longer characterizes the sentence defendant now serves.

As the possibility of parole well within defendant's life expectancy is mandated by statute, defendant's Eighth Amendment claim is moot.

C. With the Enactment of Section 3051, Resentencing Is Not Required by *Miller*

Defendant agrees he is now eligible for parole release after serving 25 years of his life term, but he argues that his sentence remains constitutionally infirm. Characterizing the holdings in *Miller*, *supra*, 132 S.Ct. 2455 and *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*) in unduly broad terms, defendant contends that those decisions require "the sentencing judge [to] make an initial determination at the time of

sentencing as to when a particular juvenile offender should become eligible for parole." (AOB 53.) Since the trial court in his case did not make that determination, defendant asserts the constitutionally mandated remedy is to reform section 12022.53, subdivision (h), to give the sentencing court discretion to strike the firearm enhancement and impose "non-LWOP 25 years to life terms for committing first degree murder with a firearm." (AOB 47.)

Defendant misconstrues *Miller* and *Gutierrez*, neither of which stand for the proposition that the trial court must decide at the initial sentencing when each juvenile murderer is eligible for parole consideration under a *Miller* factors analysis. As discussed, *Miller* banned state schemes *mandating* LWOP sentences for juveniles in homicide cases. (*Miller*, *supra*, 132 S.Ct. at pp. 2460, 2464.) Before the court imposes a sentence that renders the juvenile offender "irrevocably" sentenced to spend the rest of his or her lifetime in prison, it must consider the five factors delineated in the *Miller* opinion. (*Id.* at p. 2469.) *Miller*'s holding is restricted to the need to weigh mitigating factors of youth in imposing the "particular penalty" of life without the possibility of parole on juveniles. (*Id.* at p. 2471.) Stated differently, *Miller* requires "only that a sentence follow a certain process—considering an offender's youth and attendant characteristics before imposing a *particular penalty*." (*Miller*, *supra*, 132 S.Ct. at 2471.)

Similarly, *Gutierrez* is inapposite to defendant's argument as it addressed the situation where juvenile offenders actually received statutory LWOP sentences. (*Gutierrez*, *supra*, 58 Cal.4th at p. 1360.) Again, *Gutierrez* required the trial court to consider the *Miller* factors before ordering a juvenile offender to spend the rest of his or her lifetime in prison. (*Id.* at pp. 1360-1361, 1377-1379, 1387-1390.)

In contrast to the defendants in *Miller* and *Gutierrez*, defendant is entitled—by legislative mandate—to an opportunity for release after serving 25 years in prison. Defendant no longer faces the "particular penalty" of an arguably mandatory de facto LWOP sentence. The amendment to section 3046 actually precludes any automatic execution of an indeterminate or determinate term in excess of a 25-year parole eligibility date for juvenile offenders like defendant. Because the state no longer seeks to apply the former scheme that required defendant to serve a minimum 50-year sentence without consideration of parole, no "sentence choice" exists that triggers *Miller*'s requirement of mitigation consideration by the court.

Defendant argues that his claim nonetheless subsists because Senate Bill No. 260 does not include a reliable way to measure defendant's cognitive abilities, maturity, and other factors unique to youth when the offense was committed, nor provides the means to chart the progress the offender made toward rehabilitation since the initial sentencing. (AOB 58.) This argument is misplaced in several respects.

First, defendant's argument misreads the purpose of the factors identified by *Miller*. *Miller*'s factors were not intended or described as a constitutionally-compelled yardstick to measure the progress of a youth offender's rehabilitation during incarceration. *Miller*'s requirement that courts consider factors relevant to youth was to ensure that the imposition of a sentence of LWOP did not create gross disproportionality in the sentences of juveniles. These sentencing considerations have no application where the state has eliminated the risk of gross disproportionality by legislatively limiting the maximum number of years a youthful offender must serve before being eligible for a hearing and has mandating that the hearing be afforded without regard to *the juvenile's level of maturity and judgment*. In other words, defendant's eligibility for parole

is no longer a discretionary choice, to be informed by *Miller*'s factors; it is now required by statute.

Second, defendant can offer no convincing explanation why trial court findings on the *Miller* factors would serve as the only permissible constitutional yardstick for assessing the judgment and maturity of juvenile murderers even when LWOP or its functional equivalent is no longer at issue. Like any other prisoner with a term-of-years sentence, defendant's individualized characteristics and any circumstances in mitigation are reflected in the presentence report, the parties' submissions at sentencing, and, of course, the evidence in the record. Here, for example, the record includes defendant's actual testimony about the murder, chilling as it is. The police reports, the pretrial proceedings, and assessments in juvenile proceedings or diagnostic studies in prison can also reliably reflect a youthful offender's abilities, maturity, and judgment near in time to an offense. Defendant's youth and his level of maturity and judgment at the time of the offense are known, not unknown, quantities.

Third, the time frame for parole consideration under section 3051 does not undermine the evaluation of youth factors set forth in *Miller*. To the contrary, it affords defendant time to build a mitigating record and demonstrate rehabilitation. That is, the statutory time frame affirmatively recognizes and ameliorates the "great difficulty" identified in *Miller*, given the malleability of youth, of accurately assessing at the outset in a sentencing hearing a youthful offender's prospects for reform. (*Miller*, *supra*, 132 S.Ct. at p. 2469.) *Miller* in this sense was only a prophylactic, not a panacea.

Fourth, newly enacted section 3051 and amended section 3046, subdivision (c) satisfy *Graham*'s basic mandate—regardless of how broadly one characterizes that mandate. Together, the statutes provide defendant with a "meaningful opportunity to obtain release based on

demonstrated maturity and rehabilitation." (*Graham*, *supra*, 560 U.S. at p. 75.) The intervening legislation effectively codifies criteria the high court identified to be considered in determining whether a juvenile offender is suitable for release. In this respect, section 3051 provides:

> (f)(1) In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and *shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual.*
>
> (2) Family members, friends, school personnel, faith leaders, and representatives form community-based organizations *with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime* may submit statements for review by the board.

(§ 3051, subds. (f)(1) & (2), italics added.)

Defendant is now eligible for parole when he is 41 years old. At that time, he will be have the opportunity to demonstrate that he is sufficiently mature and rehabilitated to justify releasing him from prison back into the community. (§§ 3046, subd. (c), 3051, subds. (b)(3), (e) & (f).)

D. *Gutierrez*'s Analysis of Section 1170, Subdivision (d)(2) Is Consistent with a Finding that Section 3051 Has Rendered Defendant's Claim Moot

Relying on this court's specific holding in *Gutierrez*, *supra*, 58 Cal.4th 1354 with respect to section 1170, subdivision (d)(2), defendant contends that section 3051 does not remedy constitutional problems attendant to mandatory de facto life sentences. (AOB 54.) We disagree.

Section 1170, subdivision (d)(2)(A)(i) provides: "When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the

defendant may submit to the sentencing court a petition for recall and resentencing." The petition must include, inter alia, a "statement describing his or her remorse and work towards rehabilitation." (§ 1170, subd. (d)(2)(B).) "If the court finds by a preponderance of the evidence that the statements in the petition are true, the court shall hold a hearing to consider whether to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1170, subd. (d)(2)(E).) If a defendant's sentence is not recalled, he or she may petition again after having served 20 years. (§ 1170, subd. (d)(2)(H).) If again unsuccessful, a defendant may file a third and final petition after serving 24 years. (*Ibid.*)

Gutierrez held that section 1170, subdivision (d)(2) does not cure constitutional error where a court applies a presumption in favor of an LWOP sentence in exercising sentencing discretion. (*Gutierrez*, *supra*, 58 Cal.4th at p. 1386.) *Gutierrez* reasoned that the statute does not change a juvenile's sentence from LWOP to 15, 20 or 24 years to life, it merely provides a mechanism by which the trial court *might* recall the original sentence and impose a new one—by applying the same constitutionally infirm presumption favoring LWOP sentences. (*Ibid.*) The court in *Guitierrez* observed that recalling the original LWOP sentence and imposing a lesser sentence that offered a parole eligibility date did not eliminate error in imposing the LWOP sentence in the first place. (*Id.* at pp. 1386-1387.) Indeed, a new non-LWOP sentence effectively concedes the original LWOP sentence was a judgment that the juvenile was not incorrigible, an error transgressing *Miller* itself. (*Id.* at p. 1387.)

Section 3051, unlike section 1170, subdivision (d)(2), changes sentences to eliminate the source of *Miller* claims. It does not redress unconstitutional sentences by placing on the offender the burden of

justifying to the sentencing court a request to consider advancing the parole eligibility date. Section 3051 actually advances that date. Defendant is now eligible for parole after 25 years. And unlike section 1170, subdivision (d)(2), defendant has no burden of justification to obtain a hearing under section 3051. The youth offender hearing is required by law.

Last, defendant posits that section 3051 could be changed or repealed in the future. (AOB 51.) This is baseless speculation. As noted Senate Bill No. 260's reform was enacted to address Eighth Amendment defects in certain juvenile sentences identified by the United States and California Supreme Courts. The enactment of section 3051 vests defendant with a right to a youth offender parole hearing. (§ 3051, subd. (b)(3) ["A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age . . . *shall be eligible for release on parole* by the board during his or her 25th year of incarceration at a youth offender parole hearing . . . , italics added].) Any subsequent legislative action to repeal or infringe upon defendant's right would likely run afoul of the ex post facto clause and other constitutional provisions. (See, e.g., *Doe v. Harris* (2013) 57 Cal.4th 64, 68 ["'[R]etrospective application of a statute may be unconstitutional if it is an ex post facto law, if it deprives a person of a vested right without due process of law, or if it impairs the obligation of a contract'"], quoting *In re Marriage of Buol* (1985) 39 Cal.3d 751, 756; see also *Lynce v. Mathis* (1997) 519 U.S. 433, 445-446, citing *Weaver v. Graham* (1981) 450 U.S. 24, 32 [retroactive changes in laws lengthening the time before a prisoner is eligible for parole may violate the ex post facto clause].)

Equally important, any attempt to extend defendant's parole eligibility date contrary to the terms of Senate Bill No. 260 after his claim was found moot by this court would fail. Legislative abrogation of a judgment that

defendant is ensured a parole hearing in 25 years in compliance with Senate Bill No. 260 would impinge the separation of powers.

Under section 3051, California no longer provides, save for a few exceptions, sentences that "mandate[ ] that . . . juvenile[s] die in prison." (*Miller*, 132 S.Ct. at p. 2460.) Provided defendant while incarcerated commits no crimes punishable by a life term (see § 3051, subd. (h)), he is guaranteed a parole hearing after 25 years of incarceration. (§ 3051, subd. (b)(3).)[6] The procedures set forth in section 3051 ensure that defendant now has a meaningful opportunity to "obtain release based on demonstrated maturity and rehabilitation." (*Graham*, *supra*, 560 U.S. at p. 75.)

Given the changes to defendant's sentence, nothing in *Graham* and *Miller*, or their state progeny, justifies directing the trial court to consider eliminating the prescribed term for the gun discharge enhancement under section 12022.53. The Legislature has rejected piecemeal and arbitrary solutions to the Eighth Amendment issue in favor of comprehensive and uniform parole eligibility reform to redress constitutional infirmities in lengthy term-of-years sentences for juvenile offenders. Abrogation of state penal statutes is not called for under these circumstances.

II. DEFENDANT'S SENTENCE OF FIFTY YEARS TO LIFE FOR FIRST DEGREE MURDER IS NOT A DE FACTO LWOP SENTENCE VIOLATING THE EIGHTH AMENDMENT

Defendant argues, based on *Graham, Miller*, and *Caballero*, that a mandatory 50-years-to-life sentence for a juvenile murderer constitutes cruel and unusual punishment. He asserts that his sentence is de facto LWOP, because 50 years until a parole hearing could exceed his remaining

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[6] If he does commit new offenses in prison as an adult he would properly be denied parole for his adult offenses, without implicating *Miller* or *Graham*.

life expectancy if the statistical data were adjusted to reflect his race and the anticipated effects of his confinement in prison. (AOB 39-44.)

Alternatively, defendant argues that even if the 50-year component of his life sentence affords him a parole hearing within his expected lifetime, the sentence still amounts to de facto LWOP, because "it provides no more than an opportunity to obtain a prison-to-nursing home release." (AOB 27.) He urges *Caballero*'s definition of a de facto LWOP sentence be redefined not in terms of an offender's anticipated life expectancy, but as a parole suitable prisoner's "opportunity to experience a substantial period of normal adult life in the community." (AOB 37.) The constitution, in his view, is not satisfied by setting a parole eligibility date based on a statistical projection of a juvenile offender's anticipated remaining life. Instead, the court itself must set a parole eligibility date affording the offender the hope of experiencing life outside prison walls for a substantial period. (See AOB 36-39.) Thus, defendant argues any "lengthy" term-of-years sentence for juveniles requires the individualized sentencing considerations articulated in *Miller*. (AOB 36.)

Neither of defendant's arguments finds support in Eighth Amendment jurisprudence. Preliminarily, it is important to recognize that the issue in this case is not whether life in prison without parole for juvenile murderers is categorically cruel and unusual. *Miller* makes clear it is not. As noted, footnote 4 of *Caballero* leaves open the application of that decision to term-of-years sentences for murder.

Here, the prescribed punishment for first degree murder without special circumstances is 25 years to life in prison (§ 190, subd. (a)). The true finding for the enhancement allegation of death caused by defendant's personal discharge of a gun mandates a consecutive 25-years-to-life term (§ 12022.53, subds. (d) & (e)(1)). Thus, the precise issue in this case is "whether the sentence the trial court *was required* to impose on [defendant]

by statute constitutes cruel or unusual punishment." (*People v. Em* (2009) 171 Cal.App.4th 964, 971-972, italics added.)

Assuming defendant's challenge survives Senate Bill No. 260, respondent submits that the mandatory feature of the consecutive 25 years-to-life terms in this case does not violate the Eighth Amendment. Even if *Caballero* applies to term-of-years sentences for juveniles in homicide cases, defendant's sentence for this murder is not the functional equivalent of LWOP, as this court has defined it. "Life without the possibility of parole" means, as the phrase suggests, that parole eligibility is foreclosed for the natural life of the offender. A fortiori, a de facto LWOP sentence is one where the sentence provides for parole eligibility beyond the natural life of the offender.

Of course, there is no guarantee any given offender will live to serve 50 years (or 25 years or 10 years) in prison. What is constitutionally significant is the fact that this sentence provides parole eligibility in 50 years, which does not exceed defendant's natural life expectancy. That is sufficient to distinguish defendant's sentence from LWOP.

The rationale driving *Graham*, *Miller*, and *Caballero* is that an LWOP sentence is the functional equivalent of a sentence of death by incarceration. Where a juvenile offender's parole eligibility date falls within his or her natural life expectancy, the sentence is not functionally *indistinguishable* from LWOP. Thus, the *Miller* youth factors are not needed to identify the rare incorrigible juvenile undeserving of parole consideration, because the defendant has already been treated as an offender potentially amenable to parole. Likewise, in such cases, no *Caballero* remand is needed for the trial court to consider imposing an otherwise unauthorized term of years, because the original sentence was not the functional equivalent of LWOP in the first place.

A. *Caballero* Prohibits Only Mandatory Sentences Functionally Equivalent to LWOP

Defendant's 50-years-to-life sentence does not constitute an actual LWOP sentence. Consequently, the sentence, though mandatory, does not fall within *Miller*'s categorical holding. (*Miller*, *supra*, 132 S.Ct. at p. 2469.) As this is a homicide case, defendant's sentence also does not fall within *Graham*'s categorical prohibition.

As discussed, *Caballero*, reserved the application of *Miller* to homicide offenses "to a case that poses the issue." (*People v. Caballero*, *supra*, 55 Cal.4th at p. 268, fn. 4.) For present purposes, we assume, without conceding, that homicide cases could come within *Cabellero*'s application of *Miller* to term-of-years sentences.

Defendant's Eighth Amendment argument requires him to demonstrate that his sentence provides a parole eligibility date that falls outside his natural life expectancy. (*Caballero*, *supra*, 55 Cal.4th at p. 268.) Defendant has not made that showing.

B. A Parole Hearing at Age 66 Is Within Defendant's Natural Life Expectancy as Defined by *Caballero*

Defendant will serve 50 years before becoming eligible for parole.[7] His first opportunity for parole will come at age 66, well within his life expectancy, which *Caballero* explicitly defined as "the normal life expectancy of a healthy person of defendant's age and gender living in the United States." (*Caballero*, *supra*, 55 Cal.4th at p. 267, fn. 3.)

According to data of the Centers for Disease Control and Prevention (CDCP), life expectancy for men in the United States in 2011was 76.3 years. (Hoyert DL, Xu JQ. *Deaths: Preliminary data for 2011.* National

[7] For purposes of this argument, respondent ignores the effect of Senate Bill No. 260 on defendant's case.

Vital Statistics Reports, Vol. 61 No. 6. Hyattsville, MD: National Center for Health Statistics. 2012; *see also People v. Mendez* (2010) 188 Cal.App.4th 47, 63 [noting the life expectancy of an "18-year-old American male[ ] is 76 years"].) Total life expectancy in 2010 for males was 77 years for ages 17-18 and 76.9 for ages 16-17. (Arias, Elizabeth, *United States Life Tables 2010*, National Vital Statistics Reports, Vol. 63, No. 7, Nov. 6, 2014, p. 11 (hereafter Arias, NVSR) Table 2, Life table for males: United States, 2010, http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_07.pdf [as of March 17, 2015].) Census Bureau data reflect the average remaining male life expectancy of a 16-year-old in 2010 was 60.82, and the average remaining life expectancy of a 17-year-old American male was 59.86 years. (U.S. Social Security Adm. Actuarial Life Table, www.ssa.gov/oact/STATS/table4c6.html [as of March 17, 2015] [life expectancy for male of 76.86].)

The California Court of Appeal cases cited by defendant are in accord on the pertinent life expectancy data. (See *People v. Hernandez* (2015) 232 Cal.App.4th 278 [68 years to life imposed on a 16-year-old for nonhomicide offenses is de facto life sentence based on life expectancy of 77 to 79 years]; *People v. Argeta* (2012) 210 Cal.App.4th 1478 [75 years to life imposed on a 15-year-old for homicide is a de facto life sentence based on life expectancy]; *People v. Mendez* (2010) 188 Cal.App.4th 47 [84 years to life sentence imposed on a 16-year-old is a de facto life sentence based on life expectancy of 76].)

Most courts that have considered this question have found that an opportunity for parole after 50 years does not exceed the life expectancy of the offender. (See *Ellmaker v. State* (Kan. Ct. App. Aug, 1, 2014, no. 108,728) 329 P.3d 1253 [2014 WL 3843076] [finding juvenile's 50-year sentence was not the "functional equivalent" of a life sentence]; *People v. Aponte* (N.Y. Sup. Ct. 2013) 42 Misc.3d 868 [981 N.Y.S.2d 902, 905-06]

[no violation as to a 50.8-year sentence]; *Boneshirt v. United States* (D.S.D. Nov. 19, 2014, No. CIV 13-3008 RAL) [2014 WL 6605613] [48 years not functional equivalent of a life sentence]; *Thomas v. State* (Fla. Dist. Ct. App. 2011) 78 So.3d 644, 646 [finding no de facto LWOP where defendant would be released from prison in his late 60's]; *Angel v. Commonwealth* (Va. Ct. App. 2011) 281 Va. 248 [704 S.E.2d 386, 402] [affirming life sentence where the statutory scheme provided for conditional release at age 60]; but see *State v. Null* (Iowa 2013) 836 N.W.2d 41, 70-72 [finding a 52.5-year sentence was a life sentence by applying *Miller*'s rationale to the state Constitution]; *Bear Cloud v. State* (Wyo. 2014) 334 P.3d 132 [finding 45-year sentence a de facto life sentence].)

Defendant's 50-year sentence renders him parole eligible approximately a decade before his natural lifetime ends. This precludes a finding that defendant's sentence is a de facto LWOP as defined by this court. (See *Caballero*, *supra*, 55 Cal.4th at p. 268.)

C. This Court Should Not Consider Additional Factors Beyond Age and Gender

Acknowledging that his sentence affords him a parole hearing within his life expectancy under *Caballero*, defendant urges the court to alter its definition of "life expectancy" to account for defendant's race and the potential impact on longevity of long term incarceration. (AOB 39-43.) Defendant asserts that if his status as an African American is taken into account, "the lower end of the life expectancy range drops to 65 years." (AOB 40.)

Initially, we question whether defendant means to imply that the Eighth Amendment demands the state make African -American juveniles parole eligible at a time earlier than that provided to juveniles of other races with longer life expectancy. If defendant intends that implication, then it is

for him to show the conformity of his argument, if he can, to the federal and state Constitutions' guarantees of the equal protection of the laws.

Further, defendant's life expectancy argument rests on data for life expectancy at birth as derived from death certificates. (See Table 22, http://www.cdc.gov/nchs/data/hus/2011/022.pdf [as of March 9, 2015].) Even were this court to consider race, a person's life expectancy at birth, is not the same as that person's remaining life expectancy later in life. The CDC reports the average remaining life expectancy of African American males was 58.01 years at age 15 and 53.29 years at age 20 in 2010. (Arias, NVSR, Table 21, Life expectancy by age, race and sex: Death Registration States 1900-1902, and United States, 1929-31 to 2010—Con., p. 53, http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_07.pdf [as of March 17, 2015].) The same source has data showing expected remaining life at age 16-17 of African American males in the United States was 57 years in 2010. (*Id.*, Table 8, Life table for black males: United States, 2010, p. 23.) While that number may be a few years less than that applicable to white males, defendant's life expectancy still approximates 73 years.[8] He has not shown his parole eligibility date at age 66 "falls *outside* [his] natural life expectancy." (*Caballero*, *supra*, at p. 268, italics added.)

Defendant next points to the United States Supreme Court's analysis of certain health risks within the California's prison system to argue that his life expectancy is "even lower" if the court considers the prospect of his

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[8] The issue is complicated by the fact that life expectancy is a dynamic not a fixed point. It ebbs and flows. "Between 2009 and 2010, life expectancy increased by 0.4 years for black males (from 71.4 to 71.8) and by 0.3 years for black females (from 77.7 to 78.0). Black males experienced a decline in life expectancy every year for 1984-1989 . . . , followed by annual increases in 1990-1992, 1994-2004, and 2005-2010." (Arias, NVSR, *supra*, at p. 5.)

imprisonment for five decades. (AOB 41-44, citing *Brown v. Plata* (2011) 563U.S. __ [131 S.Ct 1910, 1923-1925].)

As with the race factor, defendant fails to demonstrate that general prison conditions are a valid factor in determining life expectancy for calculating an Eighth Amendment limitation on a sentence. Defendant merely speculates that various prison conditions could lower his life expectancy. He provides no quantifiable information on how many years may be subtracted from his life expectancy on account of prison conditions. The data he cites as indicating a life expectancy of age 55 is not based on the conditions of confinement per se. Instead, it is a composite reflective of the high incidence of drug addiction among persons sentenced to prison, and the poor physical and mental health of the prison population as a whole. However many persons in poor health one might encounter in a prison, it would not establish that defendant will experience reduced life expectancy as a result of his imprisonment. Unless the constitution proceeds from a fallacy of correlation as causation, it is essentially impossible to determine in advance if particular prison conditions will have an effect on defendant's life expectancy. And if prison conditions were simply assumed to have actual deleterious effects on the life expectancy of every single prisoner, it is anybody's guess how that should be reflected in a sentence. As much reason might exist for the state to argue a one year lowered life expectancy as defendant has to argue 10, 20, or 30 years.[9]

[9] Defendant's reliance on the *Plata* decision also ignores that the state prison system is under federal receivership with the express purpose of eliminating the cited health issues by 2016, and the state has enacted several measures to reduce overcrowding to met this target. Accordingly, the problems underlying the harms identified in *Plata* should be ameliorated long before defendant reaches his parole date.

Defendant does not demonstrate that his parole eligibility date falls outside his natural life expectancy. Although it is impossible to determine how long anyone might live with precision, government agencies have adopted and relied on standard actuarial tables for determining the life expectancy of a person. This information indicates that defendant can be expected to live to well over 70 years. Thus, while there inevitably will be numerical variations in characterizing the precise expected remaining life of a juvenile offender, it cannot be concluded that a parole hearing at the age of 66 provides defendant with no realistic opportunity for release from custody before he dies. Accordingly, the mandatory time to parole in defendant's 50-years-to-life sentence is not unconstitutional under *Graham*, *Miller*, and *Caballero*. (See *People v. Wingo* (1975) 14 Cal.3d 169, 174 [defendant must overcome "considerable burden" in challenging his sentence].)

D. The Eighth Amendment Does Not Require Juveniles Be Given an Opportunity for Release at a Point Which Provides a "Substantial Period of a Normal Adult Life in the Community"

Finally, defendant urges this court to extend *Graham*, *Miller*, and *Caballero* to require individualized sentencing for all juveniles subject to "lengthy" term-of-years sentences. (AOB 36.) Defendant acknowledges difficulty in defining a "lengthy" sentence and recognizes that acceptance of his contention might result in this court having to draw an "arbitrary line." (*Ibid.*) He argues, nonetheless, that any sentence for a juvenile not incorporating the opportunity for release from prison at a point that allows a "meaningful" or "a substantial period of normal adult life in the community," alters the offender's life by "irrevocable forfeiture" and is "practically indistinguishable from a sentence that is explicitly life "without parole." (AOB 28, 32.) We disagree.

The "lengthy" part of defendant's notion is only the beginning of the problems. It is commonly understood that a "life sentence" contemplates spending the rest of one's entire life in prison. (See Black's Law Dictionary (9th ed. 2009) p. 1485.) Neither this court nor the United States Supreme Court has ever suggested it means the absence of parole consideration in time to afford "normal adult life in the community," whatever that means in the context of a prison parolee's life, let alone normal adult life for a "meaningful" or "substantial" period, however that might be defined.

In *Graham*, the court did use the term "meaningful" to describe the opportunity for release that a juvenile must be given, but it did so in the context of rejecting executive clemency as a sufficient release opportunity mechanism to alleviate the constitutional infirmity. The high court reasoned that the possibility for clemency was too remote and did "not mitigate the harshness of the sentence." (*Graham*, *supra*, 560 U.S. at p. 70, citing *Solem v. Helm* (1983) 463 U.S. 277, 300-301.) A "meaningful" opportunity, then, does have a temporal dimension—that it be within the offender's lifetime. But the actual requirement is due process that, in contrast to executive clemency, provides a real chance for release from prison, not the opportunity for "meaningful life" after release occurs.

Nor has the high court adopted a definition of "irrevocable forfeiture" that would include a sentence that fails to provide the juvenile with "a substantial period of normal adult life in the community." In *Graham,* the high court identified sentences that "alter an offender's life by a forfeiture that is irrevocable" as those that contemplate that the offender will die in prison whether by execution or natural causes. This characteristic, which the high court found is only shared by sentences of LWOP and death, was described as follows:

> [It] 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. . . . [T]his 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."

(*Graham*, *supra*, 560 U.S. at pp. 69-70.)

A statutory LWOP sentence meets this definition because it "guarantees [the offender] will die in prison without any meaningful opportunity to obtain release, . . . even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." (*Graham*, *supra*, 560 U.S. at p. 79.) Only a sentence where death in prison is certain alters an offender's life by a "forfeiture that is irrevocable." (*Ibid.*; see also *James v. United States* (D.C. 2013) 59 A.3d 1233, 1236-1238 ["In shaping this area of law, the [c]ourt has focused on the similarities of life in prison without parole to the death penalty. With a sentence of life in prison without parole, a juvenile offender is guaranteed to die in prison"].)

Defendant's suggested requirement that he have a "meaningful life expectancy" remaining at the time of his parole hearing and a certain interval of time between parole eligibility and death is not a condition required, much less contemplated, by *Graham*, *Miller* or *Caballero*.

To the contrary, *Miller* and *Graham* explicitly distinguished life without parole sentences and the death penalty and set them apart from all other sentences. *Graham* prohibited those sentences that deny "the defendant the right to reenter the community." (*Graham*, *supra*, 560 U.S. at p. 74.) These cases only prohibit those mandatory sentences ensuring from the outset that the offender will never reenter society. To avoid such a sentence, the state must "provide a juvenile offender 'with some realistic

opportunity to obtain release' from prison *during* his or her expected lifetime. [Citation.]" (*Caballero*, *supra*, 55 Cal.4th at p. 268, quoting *Graham*, *supra*, 560 U.S. at p. 81.) Defendant's sentence complies with that requirement.

Respondent does not dispute that defendant's 50-years-to-life sentence is severe; however, unlike a sentence of life without parole or the death penalty, it is not irreconcilable with eventual release. In contrast to the abstract offender contemplated in *Graham*, who "spends the next half century attempting to atone for his crimes and learn from his mistakes" (*Graham*, *supra*, 560 U.S. at p. 79), yet still must die in prison, defendant will be afforded a parole hearing after serving that time and will have a meaningful opportunity to demonstrate that he should be released.

Defendant's sentence guarantees the opportunity for release from prison within his lifetime. Should he earn parole, it will be for defendant, not for a court, to make whatever remains to him a life worth its name—something irrevocably denied the victim.

This court should decline defendant's request to redefine a de facto LWOP sentence. There is no Eighth Amendment principle, and no sound reason, to treat sentences that afford the meaningful opportunity for parole as sentences that do not provide that opportunity.

III. IF THIS COURT CONCLUDES DEFENDANT'S 50-YEARS-TO-LIFE SENTENCE FOR FIRST DEGREE MURDER IS A DE FACTO LWOP SENTENCE, THE APPROPRIATE REMEDY IS TO REMAND TO DETERMINE WHETHER DEFENDANT IS INCORRIGIBLE

Should this court conclude that defendant's 50-years-to-life sentence is a de facto LWOP sentence, defendant asserts that the required remedy is to render the prohibition on striking section 12022.53 enhancements inapplicable to juvenile offenders and to permit the trial court to impose a sentence of 25-years-to-life imprisonment. (AOB 49.) We disagree.

Defendant's proposed remedy assumes that he cannot be sentenced to a de facto LWOP term. That is incorrect. The "high court [in *Miller*] was careful to emphasize that *Graham*'s 'categorical bar' on life without parole applied "only to nonhomicide crimes." (*Caballero*, *supra*, 55 Cal.4th at p. 267, quoting *Miller*, *supra*, 132 S.Ct. at p. 2465.) "As to homicide offenses, the United States Supreme Court has held that a state may not impose a *mandatory* LWOP sentence on a juvenile offender, although the sentencing court might impose such a sentence if it has adequately considered the offender's age and environment and found "'irreparable corruption'" (*Miller v. Alabama* [, *supra*,] 132 S.Ct. [at pp.] 2468-2469 (*Miller*) [noting LWOP sentence for a juvenile offender would be "uncommon" and imposed against the "'rare juvenile offender whose crime reflects irreparable corruption'"]; see *Caballero, supra*, 55 Cal.4th at p. 268, fn. 4.)" (*People v. Lewis* (2013) 222 Cal.App.4th 108, 188, parallel citations omitted].) Applying *Miller*, this court in *Gutierrez* concluded that a juvenile offender convicted of first degree murder with special circumstances may be sentenced to a statutory LWOP if the trial court follows the process of considering the distinctive attributes of youth and attendant characteristics identified in *Miller* before imposing such penalty. (*Gutierrez*, *supra*, 58 Cal.4th 1354, 1379.)

Given that *Miller* and *Gutierrez* recognize there are circumstances in which a juvenile homicide offender may be sentenced to a statutory LWOP, the same must hold true for a de facto LWOP sentence. (See *Gutierrez*, *supra*, 58 Cal.4th at pp. 1393-1394 (conc. opn. of Corrigan, J.) ["'Our decision does not categorically bar a penalty for a class of offenders or type of crime. . . . Instead it mandates only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before impose a particular penalty' citation omitted," quoting *Miller*, *supra*, 132 S.Ct. at p. 2471].) Here, the trial court did not have the benefit of

Miller or *Gutierrez*. Thus, the proper course is to remand to the trial court to consider the five factors identified in *Miller* and adopted by this court in *Gutierrez* and determine whether defendant's offense reflects his irreparable corruption. (*Gutierrez,* at pp. 1388-1389; see also *People v. Lewis*, *supra*, 222 Cal.App.4th at pp. 122-123 ["Because the trial court in this case did not have the opportunity to make this determination under *Miller*, we will remand for the trial court to have that opportunity"].)

If the trial court concludes after considering the *Miller* factors that defendant is not the "'rare juvenile offender whose crime reflects 'irreparable corruption'" (*Gutierrez*, *supra*, 58 Cal.4th at p. 1388, quoting *Miller*, *supra*, 132 S.Ct. at p. 2469), it must it then determine a parole eligibility date within defendant's expected lifetime. (*Lewis*, *supra*, 222 Cal.App.4th at pp. 110; *id.* at p. 123; see also *Caballero*, *supra*, 55 Cal.4th at pp. 268-269.)

Given the absence of factual development on the record as to the five *Miller* factors, this Court should not undertake that analysis in the first instance on appeal.

CONCLUSION

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

Dated: March 19, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 10,162 words.

Dated: March 19, 2015

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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 March 19, 2015, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** 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 March 19, 2015, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature

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