S 190647

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Case No. B 217709

In re Rodrigo Caballero, on Habeas Corpus

Case No. B 221833

Court of Appeal, Second Appellate District, Division 4

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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I

Any Prison Term that Exceeds a Juvenile Non-Homicide Offender's Life Expectancy is Unconstitutional

Since 2010, all federal and state courts have, without fail, rejected a prison term that exceeds the life expectancy of a juvenile offender who did not kill. Only two cases under review from Division Four of the 2nd District Court of Appeal defy this trend.[1] All other courts have reduced or vacated juvenile life terms that deny parole for non-homicide offenders under *Graham v. Florida* (2010) 560 U.S.___, 130 S.Ct. 2011 [176 L.Ed.2d 825] (*hereinafter "Graham"*). This holds true regardless of the number of victims or the viciousness of the minor's crimes and *includes* convictions for attempted murder. It represents an outright rejection of the Attorney General's theses.

The national movement proves that the taking of human life marks the demarcation between those juveniles who qualify for a reduced sentence under *Graham* and those who do not. The border is not, as the Attorney General insists, dependent on the label "life without parole" (Answer Brief on the Merits at pp. 15-16), the number of victims (*Id.* at 25, 31, 32-33), multiple convictions (*Id.* at 7, 19, 35), or whether the offender intended to kill (*Id.* at 13-14). The Attorney

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[1] *People v. Caballero* S190647 [110 to life for attempted murder offenses]; *People v. Ramirez* S192558 [120 to life for attempted murder convictions].

General has not cited one post-*Graham* case adopting her novel arguments because none exists. Manipulating sentencing terms or employing creative adult consecutive sentencing schemes to defeat *Graham's* categorical rule, as the Attorney General suggests, is prohibited. Whether denominated "minimum," "mandatory," "enhanced" or "consecutive," the maximum sentence for a minor who doesn't kill cannot exceed his life expectancy or it runs afoul of the Eighth Amendment. "This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." (*Graham, supra* 130 S.Ct. at p. 2030.)

Petitioner therefore qualifies for relief because he did not kill. His sentence of 110 years to life for attempted murder is excessive and serves no valid purpose. Petitioner's case also possesses several compelling additional mitigating factors that counsel against a lifetime of incarceration. Consistent with the many courts that have uniformly applied *Graham,* the judgment of the 2nd District Court of Appeal should be reversed.

A. No-Parole Prison Terms for Juveniles Convicted of Serious Non-Homicide Offenses—Including Attempted Murder—have been Rejected Nationwide

Each of the following cases has rejected the arguments contained in the Attorney General's Answer Brief:

In *United States v. Mathurin* (S.D.Fla. June 29, 2011, No. 09–21075–Cr) 2011 WL 2580775, a juvenile faced a federal mandatory minimum of 307 years because of several convictions carrying consecutive 25-year terms for robbery, carjacking and firearms. The District Court converted his sentence to a concurrent term of 41 years to comply with *Graham* and the Eighth Amendment.

In *People v. J.I.A.* (2011) 196 Cal.App.4th 393, review granted September 14, 2011, S194841, a 14-year-old was convicted of multiple violent sex offenses on separate victims, robbery, and forcible witness dissuasion making him parole-eligible at age 70. The court of appeal reduced the sentence to allow parole eligibility at age 56 because the sentence was cruel and unusual under *Graham* and *People v. Mendez* (2010) 188 Cal:App.4th 47 (*hereinafter "Mendez"*). The court explained: "J.A.'s sentence makes him ineligible for parole until he is 70 years of age. Although J.A.'s sentence is not technically an LWOP sentence, it is a de facto LWOP sentence because he is not *eligible* for parole until about the time he is expected to die. The trial court's sentence effectively deprives J.A. of any meaningful opportunity to obtain release regardless of his rehabilitative efforts while incarcerated." (*People v. J.I.A., supra,* slip opn. at p. 11.)

In *People v. Nunez* (2011) ____ Cal.App.4th ____, review granted July 20, 2011, S194643 (*hereinafter "Nunez"*), the Attorney General unsuccessfully defended a minor's string of 5 consecutive life sentences for aggravated kidnapping because they didn't theoretically constitute "life without parole." (*Id.* at p. 8.) The court of appeal

rejected the argument. Relying on *Graham* and *Mendez*, the court remanded the unconstitutional sentence because parole eligibility was an illusory 175 years distant.[2]

In *Manuel v. State* (Fla.App. 2010) 48 So.3d 94, 97, a 13-year-old's two life without parole sentences for two counts of attempted first degree murder and other convictions was vacated following *Graham* ["the Court established a bright-line rule excluding life-without-parole sentences for juveniles who commit nonhomicide offenses, regardless of how heinous the underlying crime"]; *accord McCullum v. State* (Fla.App. 2011) 60 So.3d 502, 503, review denied, SC11-869, 2011 WL 2906151 [17-year-old's sentence of life without possibility of parole for attempted second degree murder and robbery vacated following *Graham* and *Manuel v. State, supra,* 48 So.3d 94: "we reject the state's assertion that an attempted homicide should be treated as an actual homicide under *Graham*"]; *compare Cunningham v. State* (Fla.App. 2011) 54 So.3d 1045 [*Graham* relief denied to juvenile sentenced to four *concurrent* life terms because defendant enjoys presumptive parole release date in just 15 years].

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[2] The label "life without parole" has been bandied about by the Attorney General to distinguish *Graham.* (Answer Brief 15-16.) However, Terrance Graham was formally sentenced to a parole-eligible life term for robbery, but Florida abolished parole. This converted Graham's life sentence to *de facto* life without possibility of parole—the same as Petitioner's functionally equivalent sentence of life without possibility of parole. (*Please see* Opening Brief on the Merits 12-13.)

In *Bonilla v. State* (Iowa 2010) 791 N.W.2d 697, a 16-year-old received a mandatory life without parole sentence for kidnapping. Following *Graham*, the Supreme Court of Iowa vacated the mandatory term making the juvenile eligible for parole review immediately. (*Id.* at p. 702, n. 3.)

B. Life Imprisonment for Juvenile Homicide Offenders Conforms to *Graham*

In contrast to non-homicide offenses, courts have steadfastly refused to extend *Graham* to juveniles convicted of murder. *See, e.g., State v. Golka* (2011) 281 Neb. 360, 381 [796 N.W.2d 198, 215-16] [juvenile convicted of 2 counts of first degree murder denied relief: "Since *Graham* . . . courts have upheld sentences of life without parole for juveniles who have committed homicides. *Jackson v. Norris,* 2011 Ark. 49, ___ S.W.3d ___ (2011); *State v. Andrews,* 329 S.W.3d 369 (Mo. 2010). The majority opinion in *Andrews* states that 'the Court recognized [in *Graham*] that a line existed "between homicide and other serious violent offenses against the individual."...' 329 S.W.3d at 377. *Andrews* further states that '[b]y illustrating the differences between all other juvenile criminals and murderers, the Court implies that it remains perfectly legitimate for a juvenile to receive a sentence of life without parole for committing murder.' *Id.* We agree with the reasoning of these cases."]; *Paolilla v. Texas* (Tex.App. 2011) 342 S.W.3d 783 [juvenile convicted of capital

murder denied relief]; *Loggins v. Thomas* (11th Cir. Sept. 7, 2011, No. 09–13267) ___F.3d___ [2011 WL 3903402] [17-year-old's sentence of life without parole for murder not cruel and unusual under *Graham*]; *Jackson v. Norris* (2011) 2011 Ark. 49, --- S.W.3d ----, [2011 WL 478600] [*Graham* inapplicable to juvenile sentenced to life imprisonment without parole for capital murder]; *Cox v. State* (2011) 2011 Ark. 96, Not Reported in S.W.3d [2011 WL 737307] [juvenile sentenced to life imprisonment without parole as an accomplice in capital murder denied relief]; *Meadoux v. State* (Tex.Crim.App. 2010) 325 S.W.3d 189 [distinguishing *Graham*, life without parole for 16-year-old convicted of capital murder affirmed]; *Gonzalez v. Florida* (Fla.App. 2010) 50 So.3d 633 [16-year-old's sentence of life in prison for first-degree premeditated murder affirmed over *Graham* challenge]; *State v. Andrews* (Mo. 2010) 329 S.W.3d 369, 376-77 ["*Roper* expressly and *Graham* implicitly recognize that life without parole is not cruel and unusual punishment for a minor who is convicted of a homicide"]; *Twyman v. State* (Del. July 25, 2011, No. 747, 2010) 2011 WL 3078822 (Unpublished Disposition) [affirming sentence of 15-year-old who received two mandatory life sentences for homicide and nonhomicide offenses for murder in the first degree, murder in the second degree, attempted murder, conspiracy and firearms].

These decisions demonstrate that state and federal courts have applied *Graham* consistently, but the *Caballero* and *Ramirez* panel got it wrong. The touchstone for granting or denying a juvenile

Eighth Amendment relief is homicide—not the number of victims, or whether a crime spree developed over several incidents, or whether the minor intended to kill. The Attorney General's attempt to distinguish *Graham* on those bases should be rejected.

II

Sentencing Semantics are not Dispositive: a Consecutive Sentence that Denies Petitioner Parole Violates the Eighth Amendment

The Attorney General's argument—that a consecutive sentence for multiple attempted murder convictions is constitutionally the same as life with no parole for murder—is wrong. The Attorney General's attempt to make an end run around the U.S. Supreme Court should be rebuffed. A string of otherwise constitutional terms of years, stacked consecutively and extending beyond the lifetime of the offender, as the Attorney General posits, violates the Eighth Amendment because it implies the defendant has an "irretrievably depraved character" and is incapable of change. (*Graham, supra* 130 S.Ct. at p. 2026.) After *Graham*, judges no longer have discretion to impose consecutive terms exceeding the life expectancy of a juvenile offender who didn't kill regardless of the constitutionality of each incremental prison term. (*See People v. Nunez, supra* at p. 3: a sentence for a term of years exceeding the life expectancy of a juvenile, but without the "life without possibility of parole label," does not pass constitutional muster based on a theoretical, but illusory parole date.)

The Attorney General's reliance on *Lockyer v. Andrade* (2003) 538 U.S. 63 for the proposition that juveniles may receive consecutive mandatory terms exceeding their lives is misplaced. (Answer Brief 20-23.) In 2003, the Supreme Court noted it had not provided sufficient guidance "in determining whether a particular sentence for a term of years can violate the Eighth Amendment[;] we have not established a clear or consistent path for courts to follow." (*Lockyer v. Andrade, supra* at p. 72.) That is, until seven years later when *Graham* categorically prohibited a juvenile life term with no parole for non-homicide offenses. *Graham* is now "clearly established Federal law" and has been retroactively applied. This distinguishes all of the pre-*Graham* adult cases the Attorney General cites which employed gross proportionately to affirm a term of years sentence.

Below we show that the Attorney General's theories result in extreme unconstitutional sentences regardless of whether injuries were sustained or the number of separate violent incidents.

A. Under Respondent's Theory, Minors Who Have Not Fired Guns or Inflicted Injury Could Suffer a Lifetime of Incarceration

The Attorney General's reasoning is flawed because it assumes only serial juvenile offenders who commit multiple shooting offenses receive prison terms exceeding life expectancy. (Answer Brief on Merits 24-25.) This premise is unfounded for juvenile offenders in California generally and Petitioner's case in particular.

For example, in *People v. Corcoran* (2006) 143 Cal.App.4th 272 (*hereinafter "Corcoran"*), a 17-year-old without a prior record received determinate terms totaling 41 years *consecutive* to two *consecutive* life terms for a single, botched kidnapping-robbery in which no weapon was fired and no one was injured.[3]

Corcoran and *Caballero* demonstrate that the Attorney General's premise is wrong. The Court of Appeal made this same mistake: "Under our sentencing rules, there are only two ways a juvenile defendant can receive [a term-of-years sentence that exceeds life expectancy]. One is to commit crimes against multiple victims during separate incidents and the other is to commit certain enumerated offenses, discharge a gun, and inflict great bodily injury upon at least two victims." (*People v. Caballero* at pp. 19-20 [fn. omitted].) Petitioner's case proves that supposition incorrect because he didn't commit any of the imagined scenarios. Rodrigo Caballero didn't fire at multiple victims during separate incidents and he didn't cause at least two victims great bodily injury. Yet, he is denied parole until his 122nd birthday. This makes his sentence categorically disproportionate under *Graham* and should be reversed.

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[3] Recently, this Court denied Corcoran's petition for review without prejudice to any relief to which Corcoran might be entitled following the decision in this case, *People v. Caballero.* (*See In re Tyler Corcoran on Habeas Corpus,* S193521 (August 10, 2011).)

B. Petitioner Injured One Person During a Single Incident

In *one incident* lasting about 10 seconds, Rodrigo Caballero shot at 3 boys *wounding one*. He received consecutive terms of 35 to life, 35 to life, and 40 to life without satisfying any of the sentencing criteria set forth in Cal. Rules of Court, R. 4.425.[4] Petitioner's crimes were not independent; did not involve separate acts; and were not committed at different times or places. Furthermore, at sentencing, the court made no findings, never discussed or applied the criteria of Rule 4.425, received no argument, and imposed the maximum sentence without considering Rodrigo's mental disease, his poor education, lack of prior criminality, and the relatively short time (6 months) he belonged to a gang. (Reporter's Transcript 1285-88.)

Thus, the Attorney General's assertion that Petitioner is thrice culpable because of three convictions is misleading. (Answer Brief 31.) Not only does Petitioner's mental disease reduce his culpability,

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[4] Rule 4.425. Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

(a) Criteria relating to crimes

Facts relating to the crimes, including whether or not:

(1) The crimes and their objectives were predominantly independent of each other;

(2) The crimes involved separate acts of violence or threats of violence; or

(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

but also the so-called "repeated" offenses were committed during a single course of conduct. (Answer Brief 32.)

C. Petitioner is not the Serial Offender That Respondent and the Court Imagined

The Attorney General claims Petitioner is rightfully punished with three consecutive life terms because of three victims. This, the Attorney General argues, distinguishes *Graham* because appellant's moral culpability is compromised.[5]

"Repeated" offenses do not justify the imposition of consecutive terms when, as here, they were committed during a single course of conduct. Cal. Rules of Court, Rule 4.425 subdivision (a) discourages stacking life terms unless the offenses were committed on separate occasions.[6]

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[5] Answer Brief 31 ["appellant who intends to kill, and tries to kill, three different persons, especially in a premeditated fashion, is one whose culpability is at least treble"]; Answer Brief 32-33 ["it was only by appellant's repeated commission of these offenses on different victims that he subjected himself to a total penalty that amounted to a sentence with a minimum parole eligibility that should exceed his life"]; Answer Brief 35 ["It was not until he committed additional attempted murders that (the potential for parole) was effectively denied"].

[6] Multiple victims were a criterion for imposing consecutive sentences under former Cal. Rules of Court, Rule 425 subdivision (a) (4) until it was repealed in 1991. The new rule, Rule 4.425, does not include it. However, where appropriate, multiple victims may still be used as a

Also, Petitioner's jury was instructed that a "kill zone" expands the perimeter of liability pursuant to CALCRIM No. 600. (Clerk's Transcript 61.) In this manner, a single violent episode can result in numerous findings of liability. This concept artificially inflates criminal intent because it attributes an intention to harm many from an attempt to harm one. Yet, Petitioner's moral culpability remained the same. In a single incident, Petitioner shot wildly at a group of individuals he never knew injuring one. There was one objective, but three individuals at risk in the line of fire.

Petitioner is not as blameworthy as the imaginary defendant the Attorney General and the Court of Appeal conjured to deny relief—"an individual who shot and severely injured any number of victims during separate attempts on their lives could not receive a term commensurate with his or her crimes if all the victims had the good fortune to survive their wounds, because the sentence would exceed the perpetrator's life expectancy." (Opn. at p. 20; Answer Brief 5-6, 25.) Rodrigo injured one boy during a single episode.

Moreover, this scenario is highly unlikely. It posits a serial attempted murderer to blur the distinction the U.S. Supreme Court drew between attempts and completed homicides. The number of individuals who fit that category is undoubtedly low.

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factor in imposing consecutive sentences. *People v. Leon* (2010) 181 Cal.App.4th 452, 467.

> There is a line 'between homicide and other serious violent offenses against the individual.' *Kennedy,* 554 U.S., at ___, 128 S.Ct., at 2659-60. Serious nonhomicide crimes 'may be devastating in their harm . . . but "in terms of moral depravity and of the injury to the person and to the public," . . . they cannot be compared to murder in their "severity and irrevocability."' *Id.,* at ___, 128 S. Ct., at 2660 (quoting *Coker,* 433 U.S., at 598, 97 S. Ct. 2861 (plurality opinion)). This is because '[l]ife is over for the victim of the murderer,' but for the victim of even a very serious nonhomicide crime, 'life . . . is not over and normally is not beyond repair.' *Ibid.* (plurality opinion). (*Graham, supra* 130 S.Ct. at p. 2027.)

Petitioner's victim was hospitalized one day.

In reality, minors like Petitioner are receiving excessively long terms for multiple offenses committed during a single, brief lapse in judgment. (*Cf. People v. Ramirez* (2011) 193 Cal.App.4th 613, 631 review granted June 22, 2011, S192558 (dis. opn. of Manella, J.) ["Appellant's crimes, admittedly brutal, were planned and committed when he was 16 years old and represent the actions of a few hours on a single day of his young life."]; *and see Graham, supra* 130 S.Ct. at p. 2028: a "juvenile's 'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions

and decisions'" (quoting) *Johnson v. Texas* (1993) 509 U.S. 350, 367.)

Yet, juveniles who commit far more egregious offenses than Petitioner have received sentencing relief. (*See, e.g., People v. Nunez, supra* where a 14-year-old received 175 to life for aggravated kidnapping and four attempted murder offenses committed during 36-hour crime spree involving the firing of an AK-47 at a carload of victims and police officers on separate occasions: "While the sum of his conduct is more serious because he committed multiple offenses, and he is accordingly more culpable than a defendant who commits a single offense, under *Graham* his culpability remains diminished as a juvenile. Accordingly, no penalogical justification supports a permanent denial of parole consideration." (*Id.* at p. 14).)

In sum, Petitioner's conduct, though serious, should not result in the wholesale denial of any opportunity to obtain future release. The record proves Rodrigo Caballero suffered from schizophrenia, had no prior felony convictions, displayed bizarre trial conduct, and suffered from memory lapses and a limited education. None of these issues was considered before 110-years-to-life was imposed. The Supreme Court condemned this practice because it deprives young offenders of a chance to demonstrate eventual growth and maturity. Rodrigo Caballero regained competence in 12 short months with counseling, medication, and therapy administered during pretrial confinement. This reflects a genuine, proven capacity to change. Accordingly, his sentence should be vacated. On remand, the trial

court should order the preparation of a detailed sentencing report and provide Petitioner a hearing to present mitigating evidence.

III

Attempted Murder is not Homicide

The Attorney General claims *Graham's* use of the phrase "intend to kill" makes attempted murder a homicide. (Answer Brief 13.) But an equally logical interpretation demonstrates that Rodrigo Caballero is entitled to relief.

A. *Graham's* Use of the Term "Intend to Kill" Doesn't Bar Parole For Attempted Murder

> The Court has 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. (*Graham, supra* 130 S.Ct. at p. 2027.)

"Defendants who do *not* kill" refers to offenders like Petitioner whose acts do not cause death. Those "who do not *intend* to kill" may refer to juveniles who commit negligent homicide. Those "who do not *foresee* that life will be taken" may refer to minors who lack malice. In other words, juveniles who commit premeditated murder, or kill with actual or implied malice, or commit voluntary manslaughter, may be denied parole because they are "murderers."

Minors who commit involuntary and attempted killings are not "murderers." Under this interpretation, Rodrigo Caballero is entitled to parole because he comes within the class of offenders who possess "diminished moral culpability" deserving less "serious form of punishment than [] murderers." (*Graham, supra* 130 S.Ct. at p. 2027.)

As the Attorney General concedes, "[a]n attempted murderer does not fall precisely on either side of this traditional line—he or she neither murders yet still intends to kill . . . . [S]ome language in the Supreme Court's opinion might, in isolation, suggest that only a juvenile's completed homicide would permit a life without parole sentence." (Answer Brief 13.) But the Court's language is more than "suggestive":

> This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. (*Graham, supra* 130 S.Ct. at p. 2030.) [T]hose who were below [18] when the offense was committed may not be sentenced to life without parole for a nonhomicide crime. (*Ibid.*)

Courts have extracted a "bright-line rule" from *Graham* to deny killers relief and extend Eighth Amendment protection to attempts. (*See* cases collected at p. 4, *ante*.) This Court should do the same and vacate Petitioner's sentence.

B. Laws Buried in *Graham's* Appendix Don't Imply Attempted Murder is Homicide

Respondent's reliance on Hawaii law, the Annino Study, or Israel's sentencing practice is not persuasive. (Answer Brief 14-15.)

In Hawaii, persons sentenced to life without possibility of parole for first degree murder and attempted first and second degree murder are automatically entitled to parole consideration after 20 years.[7] Thus, reference to this law in the Court's appendix hardly supports Respondent's argument that *Graham* approves of denying parole to juveniles convicted of attempted murder. Furthermore, Hawaii authorities have confirmed the only individuals sentenced to life without parole were convicted of murder in the first degree—not attempted murder. (Paolo Annino, et al., *Juvenile Life Without Parole* (Sept. 14, 2009) Appendix II at p. 10 (*hereinafter* "Annino").)

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[7] "As part of such sentence the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment." (Haw. Rev. Stat. §706-656.)

The Annino Study omitted attempted homicide from the definition of "non-homicide" offenses. (Annino at pp. 3-4.) This was to document the incidence of a particular sentencing practice. It did not reflect policy-making that the Court subsequently adopted, but only the methodology of the study's authors. The Court relied on the research to support its statistical analysis because the Annino Study was the most recent and comprehensive study then existing. However, the Court did not embrace the study's definition of what constitutes homicide. In fact, *Graham* adopted a broader bright-line rule that has been consistently applied by lower courts "because life is over for the victim of the murderer, but not normally beyond repair for victims of non-homicide offenders." (*Graham, supra* 130 S.Ct. at p. 2027; and *see* cases collected at pp. 2-6, *ante*.)[8]

The Attorney General's argument—that an obscure reference buried in Graham's appendix means attempted murder is homicide—was also advanced in *Ramirez* and rejected. Justice Manella—the only appeals court jurist to have considered the argument—dismissed it. (*Ramirez, supra* at pp. 631-32 (dissent).)

Finally, the Attorney General's claim that Israel has sentenced any juveniles to life without parole—let alone those convicted of

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[8] The dearth of available data may also explain the narrow focus of the Annino Study. "[T]he statistics we have found concerning the number of life without parole sentences imposed for juvenile crimes over the years are not broken down between homicide and nonhomicide crimes . . ." (*Loggins v. Thomas* (11th Cir. Sept. 7, 2011, No. 09–13267) --- F.3d--- at n. 8 [2011 WL 3903402].)

attempted murder—is not accurate. (Answer Brief 14.) (*See* the detailed Israeli census contained in Connie De La Vega and Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law & Practice*, 42 U.S.F. L. Rev. 983, 1002-04 (2008).)

This casts serious doubt on the Attorney General's reasoning to resolve these cases. *Graham's* categorical prohibition of denying parole to juveniles not convicted of homicide is now established Federal law. It would be error and contrary to clearly established Supreme Court precedent to deny Rodrigo Caballero relief because *Graham's* bright-line rule separates minors who kill from all other juvenile offenders. (*Williams v. Taylor* (2000) 529 U.S. 362 [state court's refusal to set aside death sentence for denial of constitutional right to effective assistance of counsel violated established Federal law].) The Attorney General's plea to narrow *Graham's* holding has been rejected by an unbroken line of cases nationwide. This Court should refuse it as well.

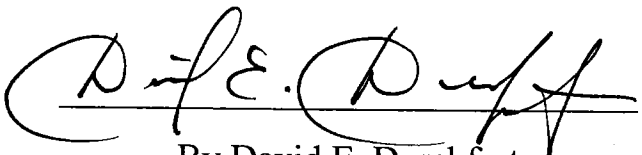
"The import of *Graham*'s holding is both implicit and explicit: juveniles are works in progress, more malleable and less formed, more capable of change and development, and less morally responsible than adults; those convicted of nonhomicide offenses are demonstrably less culpable than those convicted of taking a life; they may not be 'written off' at the time of sentencing as incapable of ever becoming sufficiently responsible to be released from custody; and because life in prison without the possibility of parole 'gives no chance for fulfillment outside prison walls, no chance for reconciliation with

society, [and] no hope,' it violates the Eighth Amendment. (*Graham, supra,* 560 U.S. at p. ___ [130 S.Ct. at p. 2032].)" (*Ramirez, supra* at p. 631 (dis. opn. of Manella, J.).) For the foregoing reasons, the judgment of the Court of Appeal should be reversed.

September 28, 2011

Respectfully submitted,

KOSNETT & DURCHFORT



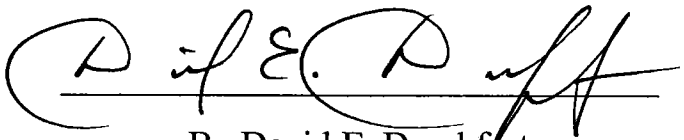
By David E. Durchfort

Certification

In accordance with Cal. Rules of Court, R. 8.504(d), I certify this brief contains 4,396 words according to the word-count function of the program used to prepare it.

September 28, 2011

KOSNETT & DURCHFORT



By David E. Durchfort

PROOF OF SERVICE

CALIFORNIA, COUNTY OF LOS ANGELES

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

On the date set forth below, I caused the document described as **PETITIONER'S REPLY BRIEF ON THE MERITS** to be served on interested parties in this action as follows:

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Clerk of the Court of Appeal 300 South Spring Street 2nd Floor North Tower Los Angeles, CA 90013-1213	Office of the District Attorney 42011 4th Street West Lancaster, CA 93534
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{XX} BY MAIL: I caused such envelope to be deposited in the mail at Los Angeles California, with first class postage thereon fully prepaid. I am readily familiar with the practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit.

{XX} STATE: I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 29 day of September 2011, at Los Angeles, California.

Monica Thompson

Monica L. Thompson