IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF AND RESPONDENT, VS. LEONEL CONTRERAS and, WILLIAM S. RODRIGUEZ, DEFENDANTS AND APPELLANTS.	) CASE NO. S224564	SUPREME COURT FILED JAN 17 2017 Jorge Navarrete Clerk Deputy

Fourth Appellate District, Division One, Case No. D063428
San Diego Superior Court, Case No. SCD236438
The Honorable Peter C. Deddeh, Judge

WILLIAM S. RODRIGUEZ'S BRIEF ON THE MERITS

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RESPONDENT WILLIAM S. RODRIGUEZ'S BRIEF ON THE MERITS

I.

ISSUE ON REVIEW

Whether a total sentence of 50 years to life in state prison is the functional equivalent of life without parole for a juvenile offender.

II.

INTRODUCTION

This case requires this Court to decide at what point in an imprisoned juvenile offender's life the constitutional mandate that he be given a "meaningful opportunity to

obtain release based on demonstrated maturity and rehabilitation" becomes meaningless. The question is whether that opportunity is meaningful, and thus constitutional, if it only first occurs in the last years of the person's life. As is explained herein, the answer to this question should be "no." A sentence that requires William S. Rodriguez (hereinafter, "appellant"), who was 16 years old at the time of the offenses, to spend 50 years in state prison before first becoming eligible for an opportunity to demonstrate maturity and rehabilitation renders that opportunity essentially meaningless and is tantamount to a sentence of life without parole. This is especially true in light of data revealing the significantly diminished life expectancies of prisoners in California.

III.

SUMMARY OF ARGUMENT

A 50-years-to-life state prison sentence is the functional equivalent of life without parole for appellant because it will deny him a meaningful opportunity to demonstrate maturity and rehabilitation as required by the United States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48, and, given the statistics concerning the life expectancy of California prisoners, will likely result in appellant dying in prison before his first parole eligibility date.

The High Court's meaningful opportunity mandate should not be interpreted as authorizing trial courts to set first parole eligibility dates for juvenile offenders at a time just before they are expected to die, as is argued by the Attorney General. This Court should reject the Attorney General's proposed life expectancy rule because: (1) it would allow trial courts to thwart *Graham* by setting a first parole eligibility date at the very end of the offender's expected life, thereby eliminating any incentive on the part of the youthful offender to demonstrate maturity and rehabilitation; (2) it fails to account for the diminished life expectancy of prisoners in California; and (3) it would unduly complicate juvenile offender sentencing hearings by requiring trial judges to review and analyze vital statistical data based on race and gender to justify their sentencing choices.

Instead, consistent with other legislation, this Court should adopt a rule requiring trial courts to set the first opportunity for juvenile offenders like appellant to demonstrate maturity and rehabilitation for possible release on parole after those offenders have served 25 years in prison.

IV.

STATEMENT OF CASE AND FACTS

A. *The evidence at trial.*

Jane Doe 1 was born on July 24, 1995. (4R.T. 543.) Jane Doe 2 was born on November 13, 1995. (3R.T. 415.) On September 3, 2011, Jane Doe 1 and Jane Doe 2 attended a family birthday party in the Rancho Penasquitos area of San Diego. (3R.T. 414-415; 4R.T. 543.) Late that afternoon during the party, as it was getting dark, the two girls decided to leave the party and go for a walk in the nearby greenbelt. (3R.T. 420, 421; 4R.T. 545-547.)

At one point the girls sat down behind a tree in the park to talk. They noticed two young men dressed in dark clothing pass by. (3R.T. 422; 4R.T. 550.) The young men wore hooded shirts with the hoods pulled up over their heads. (3R.T. 422; 4R.T. 551.) Moments later, the same two young men came up behind the girls and tackled them. (3R.T. 423.)

One of the young men, later identified as appellant, who was 16 years old, grabbed Jane Doe 2. He put one of his arms around her shoulders and his hand over her mouth so she could not scream. He then pulled Jane Doe 2 to her feet as she tried to get away. (3R.T. 424-425, 428-429, 431.)

Appellant and the other young man, later identified as co-appellant Leonel Contreras (hereinafter, "Contreras"), forced the girls to cross the street and to walk up a steep incline into the brush. As they ascended the incline, Jane Doe 2 began struggling with appellant and they both fell to the ground, but she stopped struggling when Jane Doe 1 told her to stop. (3R.T. 424-425, 428, 430; 4R.T. 470.) Contreras had put a knife to

Jane Doe 1's throat and had demanded that she tell Jane Doe 2 to be quiet. Contreras said this to Jane Doe 1 about 20 times. (4R.T. 552, 553-554.) Contreras's face was covered by a bandana. (4R.T. 557-558.) Appellant and Jane Doe 2 then walked behind Contreras and Jane Doe 1 up the incline. (3R.T. 427.)

They stopped on a "flat-ish" alcove area that was surrounded by brush. (3R.T. 426.) It was now dark outside. (3R.T. 427.) Appellant tied a bandana around Jane Doe 2's face so she could not scream. (3R.T. 428-429.) He then took Jane Doe 2 to one area of the alcove while Contreras took Jane Doe 1 to another area. Appellant removed Jane Doe 2's shorts and underwear and told her to lie on her back on the ground, which she did. (3R.T. 433-434.) Appellant put his penis in her vagina. (3R.T. 434, 436.) This was painful for Jane Doe 2 who told appellant that she was a virgin. She wore a purity ring. (3R.T 434-435.) Appellant asked Jane Doe 2 if she had a boyfriend and what school she went to. (3R.T. 435.) He also pulled the bandana down away from her mouth and kissed her. (4R.T. 472.)

After thrusting his penis into Jane Doe 2's vagina for what "felt like a long time" for Jane 2, appellant told Jane Doe 2 to turn over. He then put his penis in her anus and thrust in and out for a short period of time. (3R.T. 436-437.) Afterwards, appellant called to Contreras. (Appellant called Contreras by the name Jesus, and Contreras called appellant by the name Elijah.) (3R.T. 438-439; 4R.T. 525-526.) Contreras had been sexually assaulting Jane Doe 1 while holding a knife at her throat. (4R.T. 564-569.)[1] Appellant and Contreras then switched places. (3R.T. 439; 4R.T. 571-572.)

Appellant approached Jane Doe 1 and began "French" kissing and biting her on the cheek and neck. He put his penis in Jane Doe 1's vagina and pushed in and out. (4R.T. 573-575.) Jane Doe 1 asked appellant if she and Jane Doe 2 were going to live and appellant said that they were. (4R.T. 574.)

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[1] The specific details of Contreras's actions are not included herein.

Appellant then forced Jane Doe 1 to orally copulate him. This caused Jane Doe 1 to throw up. (4R.T. 576.) Appellant lay down on the ground on his back and told Jane Doe 1 to sit on top of him. When Jane Doe 1 sat on appellant, he put his penis in her anus and told her to "hump him." (4R.T. 576.) After a couple of minutes, appellant stood up and put his penis in Jane Doe 1's mouth again, this time for about five minutes. This caused Jane Doe 1 to gag. (4R.T. 578-579.) Appellant eventually stopped and sent Jane Doe 1 back over to Jane Doe 2. (3R.T. 440-446.) Appellant approached Jane Doe 1 and had her orally copulate him again while Jane Doe 2 orally copulated Contreras. (4R.T. 579-580.)

Appellant returned to Jane Doe 2 and put his penis in her mouth. Jane Doe 2 had trouble breathing when he did this. (3R.T. 448.) Appellant told Jane Doe Number 2 that he would hurt her if she screamed. (3R.T. 449.) Appellant also kissed Jane Doe 1 and told her that she was beautiful and that if he had known her on another occasion she would be his girlfriend. (4R.T. 476, 582.)

After completing these acts, appellant and Contreras ordered the girls to put on their clothes. (4R.T. 475, 583.) As Jane Doe 2 dressed, appellant put his finger in her vagina and kissed her. (4R.T. 477-479.) Appellant and Contreras warned the girls not to tell anyone about what had happened. Appellant said that if they told anyone, he and Contreras would follow them to where they lived and hurt them. (4R.T. 476, 485.) Contreras also threatened Jane Doe 1 that if she told anyone about what happened, he would hurt one of her family members. (4R.T. 598; 5R.T. 667.) Contreras pulled a bike out of the bushes and walked the girls partway down the slope. (4R.T. 477, 480.)

Once the girls got to the road, they saw Jane Doe 1's parents who had been out looking for them. (4R.T. 481, 602; 5R.T. 655-656, 660.) It was about 8:30 or 9:00 p.m. (5R.T. 653, 656.) The girls got into Jane Doe 1's father's car and told him to drive away. (4R.T. 482.) Jane Doe 1's mother kept asking the girls about what had happened to them. (4R.T. 482-483, 603.) At first the girls did not say anything and then they revealed that

they had been raped. (4R.T. 483.) The girls were still afraid of appellant and Contreras. (4R.T. 483, 603.)

Jane Doe 1's parents drove the girls back to the house where the party had occurred and someone there called the police. (4R.T. 484, 603.) Several police officers arrived and took statements from the girls about what had happened. The girls showed the officers where the incident took place. (4R.T. 485-486, 604.) A police detective then escorted the girls with their parents to the hospital where the girls underwent sexual assault examinations. (4R.T. 486, 605; 5R.T. 723-724.) The police detective photographed various cuts and scratches that the girls received during the incident. (4R.T. 487-488, 590.) Doctors documented debris and injuries on the girls' bodies consistent with having been sexually assaulted. (5R.T. 739-745, 783-784, 787, 796-797, 803.)

Later, both Jane Doe 1 and Jane Doe 2 identified appellant from a photograph as one of the suspects who had raped them. (4R.T. 494, 607-608; 5R.T. 834, 851.)

Police detectives interrogated appellant on September 8, 2011. (9R.T. 1486-1487.) During the interrogation, appellant told the detectives that, on the day of the incident, he had been smoking marijuana with Contreras and that they were very "high." (5C.T. 1533-1535, 1600.) They were walking in the area of the greenbelt smoking marijuana when Contreras told appellant about the girls. (5C.T. 1539-1540.) The girls were sitting under a tree. (5C.T. 1535.) Appellant had no plans to do anything except smoke marijuana. (5C.T. 1536.) At that moment they decided to do it. (5C.T. 1536-1537.) Contreras told appellant that he had a knife and it just came into their heads to do it. (5C.T. 1540-1541.) Appellant told the detectives, "the body is controlled by the memory and the body is weak when it sees flesh." (5C.T. 1541.) "And I don't know, honestly I, I regret that, and I have to pay for it, I will. Because I repent, and . . . I don't know, it was a moment that we didn't even think about, it was just . . .." (5C.T. 1542:3-8.) Contreras had the knife. (5C.T. 1542.)

According to appellant, he and Contreras told the girls to start walking. (5C.T. 1548.) The smaller girl started struggling but appellant never hit her. (5C.T. 1548-1549.) Contreras wore a bandana. (5C.T. 1550.) During the walk, the girls fell down and he and Contreras ordered them to get back up. (5C.T. 1552.) Appellant put a bandana on the small girl's face so she would not yell. (5C.T. 1554-1555.) When they arrived at the place in the greenbelt, he told the girl to take off her dress and to lie down. She took off her dress and underwear and lay down. (5C.T. 1556-1559.) Appellant had sex with the girl but did not finish inside of her. (5C.T. 1562-1565.) He forced the larger girl to orally copulate him. (5C.T. 1566.) It was his idea to switch the girls. (5C.T. 1567.) He then vaginally raped the bigger girl. (5C.T. 1570.) He never ejaculated. (5C.T. 1571.) He acknowledged that the girl was afraid even though he did not have a knife. (5C.T. 1574-1575.)

Appellant denied putting his penis in the girl's anus. (5C.T. 1576.) They stopped when they heard people coming. (5C.T. 1578-1579.) He told the girls not to yell and he and Contreras rode away on a bike toward the street where he was living. (5C.T. 1580-1581.)

Appellant apologized to the girls. (5C.T. 1597.)

B. *The trial and verdict.*

Appellant was prosecuted as an adult pursuant to Welfare and Institutions Code section 707, subdivision (d)(1) and (d)(2)(A). (2C.T. 431-463.) His jury trial commenced on October 4, 2012. (6R.T. 1900.) Co-defendant Contreras's trial commenced on the same date in the same courtroom before a separate jury. (6R.T. 1894, 1900.)

On November 5, 2012, appellant's jury returned verdicts finding him guilty of two counts of kidnapping in violation of Penal Code[2] section 207, subdivision (a), two counts

[2] All further statutory references shall be to the Penal Code.

of rape in violation of section 261, subdivision (a), four counts of forcible oral copulation in violation of section 288a, subdivision (c)(2)(A), and two counts of forcible sodomy in violation of section 286, subdivision (c)(2)(A). (6R.T. 1933-1943.)

The jury also found true, as to all of the above-referenced sex offenses, that appellant kidnapped the victims within the meaning of section 667.61, subdivision (a), (c) and (d)(2), and that the offenses involved multiple victims within the meaning of section 667.61, subdivisions (b), (c) & (e). (6R.T. 1933-1943.)[3]

C. *The sentencing hearing and the sentence.*

Appellant was 16 years old when the offenses occurred. He was 17 years old at the time of his sentencing. (6C.T. 1674, 1874.)

During the sentencing hearing, the prosecutor read a letter to the trial court from the family of Jane Doe 2 detailing the emotional ordeal that Jane Doe 2 and her family had undergone as a result of the crimes. (16R.T. 2901-2903.) The prosecutor asserted that appellant faced a sentence of 200-years-to-life in prison. However, the prosecutor acknowledged that such a sentence would constitute cruel and unusual punishment under *Graham v. Florida, supra,* 560 U.S. 48 and *People v. Caballero* (2012) 55 Cal.4th 262. The prosecutor therefore urged the trial court to sentence appellant to serve not less than 50-years-to-life in prison. (16R.T. 2914; 6C.T. 1665-1669.)

Appellant's counsel presented to the trial court extensive information concerning appellant's background, and numerous letters of support from his family, friends, and teachers. (6C.T. 1698-1798.16.) This information showed that, as a child growing up in Guatemala, appellant was surrounded by abuse and unrelenting violence. He witnessed the murder of his friend and learned of the kidnapping and murders of his own family by violent gangsters. He ultimately fled his homeland and traveled alone to the United

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[3] The jury determined that appellant was not guilty of one of the original charges and it failed to reach unanimous verdicts on several other charges. Those charges were later dismissed. (6C.T. 1934, 1945.)

States under extremely difficult conditions, and he even witnessed the death of a fellow migrant during his journey. As a result of his traumatic upbringing and ordeals, appellant was diagnosed as suffering from post-traumatic stress disorder, which he masked with alcohol and marijuana. (6C.T. 1684-1685, 1687-1688, 1798.06-1798.07, 1798.14.) The psychologist concluded: "[Appellant] presents as a sad and defeated minor who rarely received any type of positive affection, attention or encouragement, and who never received the therapeutic or familial support needed to counter the devastating impact of abuse and trauma." (6C.T. 1798.08.)

Appellant had no prior criminal record when the crimes occurred, and he immediately confessed his involvement to police when he was arrested. He expressed remorse for his actions and apologized to his victims. (6C.T. 1694.)

Appellant's counsel asked the trial court to sentence appellant to a determinate term of 20 to 30 years in state prison. (6C.T. 1695.) She argued that a 50-years-to-life prison sentence was not proportional to the crimes. (16R.T. 2906; 6C.T. 1675-1695.) She said:

> "When the Court says he has to have a meaningful opportunity to obtain parole, that he has to have an opportunity to show that he has been rehabilitated, that he had matured, that he's turned into a responsible adult, I think the spirit of the law is seeing that he should then have an opportunity to have a life outside of the prison walls, not a handful of years but a life where he can still show that he he's a productive person, where he can still accomplish something outside of prison life. ¶ If he's given a 50-to-life-sentence, I think that takes away all of his hope." (16R.T. 2908:9-19.)

After hearing arguments from both sides, the trial court agreed that it could not constitutionally sentence appellant to serve 200 years to life in state prison. (16R.T. 2908-2909.) Instead, the trial court sentenced appellant to serve two consecutive 25-years-to-life sentences, for a total term of 50 years to life in state prison. (16R.T. 2916.) The trial court opined that this term was the highest it could impose on appellant under the controlling legal authorities. (16R.T. 2914:16-22.) The trial court also said that it

would not run the two 25-years-to-life terms concurrently as requested by appellant's counsel, "because in my thinking, you don't get a free victim." (16R.T. 2915-2916:27-2; 6C.T. 1864-1866, 1946-1948.)

D. *The Court of Appeal opinion.*

Appellant argued on appeal that his 50-years-to-life sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment and the Court of Appeal agreed. (Opinion at 38.) After analyzing the United States Supreme Court cases of *Graham v. Florida, supra,* 560 U.S. 48 (*Graham*) and *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455], the Court of Appeal concluded:

> "Pending further guidance, we must consider the constitutional propriety of Rodriguez's and Contreras's sentences in light of the two interrelated requirements underpinning *Graham's* holding: (1) a state must give a juvenile nonhomicide offender a realistic chance to demonstrate maturity and reform, and (2) a state may not decide at the time of sentencing a juvenile nonhomicide offender is 'irredeemable' and 'never will be fit to reenter society.' (*Graham*, *supra*, 560 U.S. at pp 75, 79, 82.) Rodriguez's and Contreras's sentences do not meet either requirement. Even under an optimistic projection of their life expectancies, the sentences preclude any possibility of parole until they are near the end of their lifetimes as the parties agree Rodriguez will be 66 and Contreras will be 74 when they are first eligible for parole. This falls short of giving them the realistic chance for release contemplated by *Graham*." (Opinion at pp. 40-41.)

The Court of Appeal reversed appellant's sentence and remanded the matter for the trial court to "consider all mitigating circumstances attendant in the appellants' crimes and lives and impose a time when they may seek parole from the parole board consistent with the holding in *Graham*, *supra*, 560 U.S. at 82. (*Caballero*, *supra*, 55 Cal.4th at pp. 268-269.)" (Opinion at p. 42.) The Attorney General petitioned this Court for review.

V.

ARGUMENT

A TERM OF IMPRISONMENT OF 50 YEARS TO LIFE FOR A NONHOMICIDE OFFENSE COMMITTED BY A 16 YEAR OLD OFFENDER IS THE FUNCTIONAL EQUIVALENT OF LIFE WITHOUT THE POSSIBILITY OF PAROLE BECAUSE IT DENIES THE JUVENILE OFFENDER A MEANINGFUL OPPORTUNITY TO DEMONSTRATE MATURITY AND REHABILITATION FOR RELEASE ON PAROLE; SUCH A SENTENCE VIOLATES THE EIGHTH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT.

A. *Introduction.*

Appellant was 16 years old when he committed the offenses in this case, and, as the Court of Appeal found, he will not be eligible for parole until he is 66 years old. (Opinion at p. 41.) Because this sentence effectively denies appellant a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" (*Graham*, *supra*, 560 U.S. 48, 75), it is equivalent to a life-without-parole sentence, particularly when considering data showing that the average age of death of prisoners in California is 60 years old. A rule which would authorize trial courts to set first parole eligibility dates at the expected end of juvenile offenders' lives, as proposed by the Attorney General, discards the fundamental principle of the *Graham* opinion that children, who have the capacity to mature and rehabilitate, should be given a meaningful opportunity to demonstrate such maturity and rehabilitation for release.

B. *A sentence that only offers a juvenile offender the prospect of release from prison and reentry into society at the end of his or her life does not provide the juvenile offender with a meaningful opportunity to demonstrate maturity and rehabilitation; such a sentence is the functional equivalent of life without parole.*

1. For a sentence to be constitutional under the Eighth Amendment, a juvenile offender who commits a nonhomicide offense must be given a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation; appellant's 50-years-to-life sentence does not comply with that requirement.

In *Graham*, the United States Supreme Court held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." (*Graham* at 74.) The Court reasoned that, based on the nature of the crime and the juvenile's undeveloped moral sense, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." (*Id.* at 69.)

> "As compared to adults, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility'"; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.' *Id.*, at 569-570, 125 S.Ct. 1183, 161 L.Ed.2d 1. These salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' *Id.*, at 573, 125 S.Ct. 1183, 161 L.Ed.2d 1. Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.' *Id.*, at 569, 125 S.Ct. 1183, 161 L.Ed.2d 1." (*Graham* at 68, quoting, *Roper v. Simmons* (2005) 543 U.S. 551.)

Moreover, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults. *Roper*, 543 U.S., at 570, 125 S.Ct. 1183." (*Ibid.*)

Thus, according to the Court in *Graham*, for a sentence to be constitutional under the Eighth Amendment, a juvenile offender who has committed a nonhomicide offense must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id.* at 75) A state may not render a judgment at the outset that a juvenile offender will never be fit to reenter society. (*Ibid.*)

In *Miller v. Alabama*, *supra*, 132 S.Ct. 2455, the High Court extended the reasoning in *Graham* to homicide offenses, finding unconstitutional state sentencing schemes that compel life without parole for juvenile offenders. (*Id.* at 2469.)

> "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity,

> impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." (*Id.* at 2468.)

A mandatory life without parole sentence "disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Ibid.*) *Miller* therefore requires that, before sentencing a juvenile offender to a lifelong prison sentence, the trial court must consider the "distinctive attributes of youth" and how those attributes "diminish the penological justifications for imposing the harshest sentences on juvenile offenders." (*Id.* at 2465 and 2467.)

In *People v. Caballero*, *supra*, 55 Cal.4th 262, this Court concluded that *Miller* "made it clear that *Graham's* 'flat ban' on life without parole sentences applies to all nonhomicide cases involving juvenile offenders, including the term-of-years sentence that amounts to the *functional equivalent* of a life without parole sentence imposed in this case." (*Id.* at 267-268, italics added.)

> "*Graham's* analysis 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." (*Id.* at 268.)

This Court "did not further elaborate what it means for a sentence to be the 'functional equivalent' of LWOP . . .." (*People v. Franklin* (2016) 63 Cal.4th 261, 276.) Nevertheless, the sentence at issue in *Caballero*, which required the defendant to serve 110 years before becoming eligible for parole, constituted cruel and unusual punishment because, with the parole eligibility date falling outside of that juvenile offender's natural life expectancy, the sentence denied him the "opportunity to 'demonstrate growth and

maturity' to try to secure his release, in contravention of *Graham's* dictate." The sentence amounted to a *de facto* term of life without parole. (*People v. Caballero*, *supra*, 55 Cal.4th 262, 268.) In a footnote, this Court defined the term "life expectancy" as meaning, "the normal life expectancy of healthy person of defendant's age and gender living in the United States." (*Id.* at 267, fn. 3.)

Under this Court's definition of life expectancy in the footnote in *Caballero*, and *without* considering the impact of incarceration, appellant's total life expectancy would be about 76 years according to the National Vital Statistic Report cited by the Attorney General, and according to the statistics cited in *People v. Mendez*, (2010) 188 Cal.App.4th 47, 63, or it would be about 72.5 years according to a report by the Center for Disease Control and Prevention in May of 2014. (Centers for Disease Control and Prevention, Health, United States, 2013, table 18 <http://www.cdc.gov/nchs/data/hus/2013/018.pdf> (as of Nov. 5, 2014) [72.5 years for male born in 1995].)

Therefore, because appellant would have to live to be 66 years old before he could ever become eligible for parole, and, again, without accounting for the impact of incarceration, appellant would, at best, have between six-and-a-half and ten years left to live if granted parole at his very first parole hearing. Co-appellant Contreras, who would be 74 years old at the time of his first parole eligibility date, would have two years left to live, or be dead. Whether a first parole eligibility date is with two years, or ten years, left to live based on vital statistic records, both appellant and Contreras will be denied a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham*, *supra*, 560 U.S. at 75.) Their sentences deny them any real hope for any sort of life after having spent half a century behind prison walls.

2. The Attorney General's proposed life expectancy rule would render meaningless the fundamental rehabilitation and reform principles underlying the *Graham* and *Miller* decisions.

The Attorney General's proposed life expectancy rule, which would allow trial courts to set first-parole-eligibility dates near, or even at, the end of the juvenile offenders' expected lives (such as the 50-years-to-life sentence imposed in this case), disregards the rehabilitation and reform principles underlying *Graham* and *Miller* decisions, and it "forswears altogether the rehabilitative ideal." (*Graham*, *supra*, 560 U.S. at 74.)

As the Court in *Graham* noted, "'[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.'" (*Id.* at 68, quoting, *Roper v. Simmons* (2005) 543 U.S. 551, 570.) Children have the "capacity for change." (*Miller*, *supra*, 132 S.Ct. at 2465; See, *Graham* at 79 ["Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation."].) A juvenile offender should not be required to wait until the very end of his or her life for the first opportunity to demonstrate that reform.

Not only would the Attorney General's proposed rule repudiate the High Court's core principle that children can reform, but it would ultimately render *Graham's* "meaningful opportunity" mandate meaningless by authorizing trial courts to set first-parole-eligibility dates right before juvenile offenders are statistically expected to die. Under the Attorney General's proposal, any statistical life expectancy at the time of the first-parole-eligibility date, however short, would be acceptable for Eighth Amendment purposes. Thus, under the Attorney General's requested rule, a sentence that provides the juvenile offender with a first opportunity to demonstrate maturity and rehabilitation within as little as one year of the expected end of his or her life would not violate the Eighth Amendment. Such a result would throw *Graham's* "meaningful opportunity" mandate to the wind.

The imposition of fixed and essentially lifelong sentences based on life expectancy statistics, as envisioned by the Attorney General, would deny juvenile offenders hope for the future and it would eliminate any motivation on their parts to demonstrate rehabilitation. The possibility of, at best, geriatric parole would hardly incentivize a youthful offender to become a responsible person. Just as, under this Court's holding in *Caballero*, the 110-years-to-life sentence denied the juvenile offender a "meaningful opportunity" to demonstrate maturity and rehabilitation, so too would a sentence that only offers the juvenile offender a first-parole-eligibility date at the expected end of his or her life. The offender would never hold a job, raise a family, or experience any sort of normal life. Such a sentence would be virtually indistinguishable from a sentence that is explicitly "without parole." It would mean a denial of hope for the juvenile offender and would "alter[] the offender's life by forfeiture . . .." (*Graham*, 560 U.S. at 69-70) This would not be the kind of "meaningful opportunity" contemplated by the High Court in *Graham*.

3. Any life expectancy approach should take into account the diminished life expectancy of prisoners in California and the individual characteristics of the offenders.

If this Court intends to adopt a rule requiring trial courts to set first-parole-eligibility dates based on an offender's life expectancy, and given the emphasis in *Miller* and *Graham* on the characteristics and backgrounds of the individual offenders, such a rule should require trial courts to take into account the offenders' life expectancies as prisoners in California, and their personal backgrounds and health histories. (See, *Miller, supra,* 132 S.Ct. 2455, 2468; *Graham, supra*, 560 U.S. 48, 68.)

Recent data shows that the average life expectancy of prisoners in California is far shorter than the life expectancies described in the vital statistics report presented by the Attorney General in her briefing in this case. According to Kent Imai, M.D., a consultant to the California Prison Receivership, the average age of death of inmates in California in 2014, excluding suicide, drug overdose, and homicide, was 60 years old. The average

age of death for all inmates in 2014 was 56 years old. (Imai, *Analysis of 2014 Inmate Death Reviews in the California Correctional System* (July 2015) p. 7, available at, <http://www.cphcs.ca.gov/docs/resources/OTRES_DeathReview AnalysisYear2014 _20150730.pdf>.)

In Dr. Imai's previous report, which calculated the average of death for California inmates in 2012 to be 55 years old, he noted that the shortened life expectancy of California prisoners reflected "the higher prevalence of addiction to drugs and tobacco, chronic hepatitis C infection, depression and other severe mental illnesses, and other social, racial and economic factors." (Imai, *Analysis of 2012 Inmate Death Reviews in the California Correctional System* (July 2015) p. 7, available at, <http://www.cphcs. ca.gov/docs/resources/OTRES_DeathReviewAnalysisYear2012_20130808.pdf>; see also, *United States v. Tavera* (E.D.N.Y. 2006) 463 F.Supp.2d 493, 500 [life expectancy within federal prison considerably shortened].)

Furthermore, even the Attorney General has acknowledged the diminished lifespan of prisoners. According to "OPEN JUSTICE," which the Department of Justice calls "[a] transparency initiative led by the California Department of Justice that publishes criminal justice data so we can understand how we are doing, hold ourselves accountable, and improve public policy to make California safer," the California Department of Justice found that, from 2005 through 2014:

> "The average age of sentenced and incarcerated individuals who died due to natural causes was **56 years old**. Among those who committed suicide, the average was 39 years of age. The average among those who died due to accidental causes and homicide by another inmate was 41 years old and 44 years old respectively." (<https://openjustice.doj.ca.gov/death-in-custody/ overview>, emphasis added.)

Thus, based on Dr. Imai's and the California Department of Justice's own statistics, in light of appellant's 50-years-to-life sentence, appellant will likely die in prison before

having *any*, much less a *meaningful*, opportunity of demonstrate maturity and rehabilitation for release on parole.

C. *This Court should reject the Attorney General's proposed rule, which would require trial courts to make life expectancy findings based on national vital statistics reports, because it would unreasonably complicate sentencing hearings and encourage racial and gender disparity in sentencing.*

The Attorney General's proposed life expectancy rule for determining a first parole eligibility date would require trial courts, before imposing a sentence, to examine and interpret vital statistics data to calculate how long a juvenile offender is expected to live. As previously noted, depending on its source, such data varies (i.e., average life expectancy outside of prison is between 72.5 and 76.2 years, and 60 years for prisoners).

A requirement that trial courts decipher such data to determine the life expectancies of juvenile offenders would turn sentencing hearings into complex mini-trials with expert witnesses speculating about the potential length a particular juvenile offender's life. One could imagine a scenario where a juvenile offender's attorney is accused of providing ineffective assistance for failing to present certain data to a trial court showing that his client's life expectancy was shorter than was claimed by the prosecution.

As the Iowa Supreme Court stated:

> "[W]e do not believe the determination of whether the principles of *Miller* or *Graham* apply in a given case should turn on the niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates. In coming to this conclusion, we note the repeated emphasis of the Supreme Court in *Roper*, *Graham*, and *Miller* of the lessened culpability of juvenile offenders, how difficult it is to determine which juvenile offender is one of the very few that is irredeemable, and the importance of a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' *Graham*, 560 U.S. at ___, 130 S.Ct. at 2030, 176 L.Ed.2d at 845-46." (*State v. Null* (Iowa 2013) 836 N.W.2d 41, 71-72.)

Furthermore, as can be seen by the record in this case, the life expectancy data shown in the vital statistics reports are based on a person's race, gender, and year of birth. Applying the Attorney General's proposed rule would necessarily compel trial courts to always take race and gender into consideration when calculating life expectancies, and to sentence individual defendants differently based on their immutable characteristics. This would arguably violate the individual defendant's constitutional rights to equal protection of laws. (*People v. Olivas* (1976) 17 Cal.3d 236, 250-251.)

For example, the statistical data presented in this case by the Attorney General indicates that, while the average life expectancy of a male born in 2010 is 76.2 years, the life expectancy of a female born the same year is 81 years. Applying the Attorney General's life expectancy approach, a white female could constitutionally be sentenced to a longer term in prison before her first parole eligibility date than a male who committed the same offense simply because, as a white female, she is statistically expected to live longer. Similarly, according to the data presented by the Attorney General, a black male born in 2010 has a life expectancy of 71.8 years, some seven years less than a white male. The black male should therefore receive an earlier first parole eligibility date than the white male.

While a person's race and gender should not matter for sentencing,[4] the Attorney General's proposed life expectancy rule would require trial courts to include those factors in their sentencing rulings. The High Court in *Graham* could not have intended its decision to encourage racial and gender disparity in sentencing.

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[4] California's concern about addressing racial disparity in sentencing is reflected in Section 1170.45, which requires the Judicial Council to collect data on the disposition of criminal cases based on the race and ethnicity of the defendants and report its findings annually to the Legislature.

D. ***The Legislature has determined that providing a juvenile offender a first opportunity to demonstrate maturity and rehabilitation after serving 25 years in state prison complies with Graham. Providing a juvenile offender with a first opportunity to demonstrate maturity and rehabilitation when the offender is in his or her forties avoids the constitutional complications created by the Attorney General's proposed life expectancy rule and should be followed in this case.***

The Court of Appeal in this case determined that appellant's 50-years-to-life sentence did not provide him with a "realistic chance to demonstrate maturity and reform" for release on parole during his lifetime. (Opinion at 41.) A first opportunity to demonstrate maturity and rehabilitation will not be a *meaningful opportunity* if it only first occurs at or near the end of an inmate's life. Put another way, compliance with *Graham* requires that there should be some "substantial life expectancy left at the time of eligibility for parole." (*People v. Perez* (2013) 214 Cal.App.4th 49, 57 [a first parole opportunity at age 47 provides substantial life expectancy after release].)

The Legislature has recently determined that, for the majority of crimes, 25 years of incarceration is the longest period that a juvenile offender must serve before becoming eligible for his or her first parole hearing. (§ 3051.) The purpose of section 3051 was "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 [*Caballero*] and the decisions of the United States Supreme Court in [*Graham*] and [*Miller*]." (Legis. Counsel's Dig., Sen. Bill No. 260 (2013–2014 Reg. Sess.) § 1, pp. 2–3; *People v. Franklin, supra*, 63 Cal.4th 261, 277-278.) Thus, under the Legislature's new approach, a first parole hearing after serving 25 years meets *Graham's* "meaningful opportunity" requirement.

Accordingly, it should be unconstitutional to impose any sentence that requires a youthful nonhomicide offender to spend more than 25 years in prison before having a first opportunity to demonstrate maturity and rehabilitation for parole. It is cruel to scorn

a juvenile with a *pro forma* end-of-life first opportunity to demonstrate maturity and rehabilitation. In light of section 3051's application to the vast majority of juvenile offenders, it is also unusual. On the other hand, allowing for the first opportunity for release on parole when the offender is in his or her forties will comply with *Graham*, will provide the youthful offender with an incentive to demonstrate maturity and rehabilitation, and will avoid the complications associated with having trial courts determine when a particular offender is statistically expected to die.

Alternatively, this Court should affirm the judgment of the Court of Appeal which requires that the trial court consider a date when appellant will have a reasonable first opportunity to demonstrate maturity and rehabilitation for release on parole. As the Court of Appeal noted, the trial court's concern that the imposition of concurrent 25-years-to-life sentences would appear to give the defendants "a free victim" did not, by itself, justify its decision to sentence appellant and Contreras to terms that did not give them a realistic chance for release on parole. (Opinion at p. 41, 42.)

VI.

CONCLUSION

Based on the foregoing, appellant's 50-years-to-life sentence amounts to the functional equivalent of life without parole. The Court of Appeal ruled correctly and its judgment should be affirmed.

Dated: January 13, 2017

Respectfully submitted,

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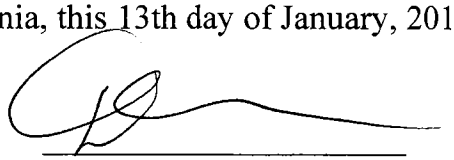
People v. Rodriguez, Supreme Court Case No. S224565

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c), I hereby certify that this brief has a word count of 7,389 words.

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

Executed in San Diego, California, this 13th day of January, 2017.

By: 

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People . Rodriguez, Supreme Court case no. S224564

PROOF OF SERVICE BY MAIL

I am an attorney in the County of San Diego, State of California. I am, and was at the time of the service hereinafter mentioned, over the age of 18 and not a party to this action. My business address is 2254 Moore Street, Suite 201, San Diego, California, 92110. On January 13, 2017, I served the following documents:

WILLIAM S. RODRIGUEZ'S BRIEF ON THE MERITS

by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

1. Tami Falkenstein Hennick
   Office of the State Attorney General
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2. Appellate Defenders, Inc. (served at: eservice-criminal@adi-sandiego.com.)

3. Office of the District Attorney, Appellate Division
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4. Hon. Peter C. Deddeh C/O Clerk of the Superior Court
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5. William Rodriguez C/O Kessler & Seecof, LLP
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Daniel J. Kessler