In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **LEONEL CONTRERAS and WILLIAM STEVEN RODRIGUEZ,** **Defendant and Appellant.**	Case No. S224564

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

REPLY BRIEF

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INTRODUCTION

The facts of the present case are tragic. They are tragic for appellants, who will spend much of their lives in prison, and they are tragic for the victims, who will live with appellants' heinous acts for the rest of their lives. The question before this court, however, is a relatively narrow one under the Eighth Amendment: whether sentences that provide an opportunity for parole no later than by the time appellants reach the ages of 66 and 74, respectively, constitute the functional equivalent of a term of life without the possibility of parole (LWOP). All parties agree that the guiding principle in answering this question is whether the sentences provide for "some meaningful opportunity to obtain release." But appellants seek to alter this standard from a "meaningful opportunity" to "an opportunity for meaningful release." Indeed, appellants would apparently extend the constitutional protections against cruel or unusual punishment to include the right to "a normal adult life in the community," including "holding a job or raising a family." (Contreras Brief on the Merits (CBOM) 27; see also Rodriguez Brief on the Merits (RBOM) 16.) But appellants' proposed rule goes well beyond the categorical limitations on punishment established by the United States Supreme Court when a sentence amounts to the equivalent of a death judgment. Appellants both have hope of some years of life outside prison. This means not only that they will have opportunity to prove their rehabilitation and self-improvement, if any, but also that their sentences are not the equivalent of a death judgment and therefore the Supreme Court's categorical limitations do not apply.

ARGUMENT

I. APPELLANTS' SENTENCES DO NOT CONSTITUTE THE FUNCTIONAL EQUIVALENT OF AN LWOP; INSTEAD, THEY PROVIDE HOPE OF SOME YEARS OUTSIDE PRISON WALLS

A juvenile has no "meaningful opportunity to obtain release" where his or her sentence is the functional equivalent of a death judgment, which for a juvenile includes a sentence in which there is no possibility of release. Conversely, where there is hope of some years outside prison, the Eighth Amendment's categorical bars on punishment imported from the capital context do not apply. A lengthy sentence is permissible, as long as the juvenile ultimately has the opportunity to demonstrate rehabilitation; the Constitution requires nothing more. Although the California Legislature created a cap of 25 years for most juveniles to be eligible for a parole hearing, it specifically declined to apply this cap to One Strike offenders such as appellants, instead leaving it to the courts to determine the upper age at which such juveniles can receive a parole hearing and still have a meaningful opportunity to obtain release. As this court has previously concluded, reliance on statistical data to establish a normal, healthy person's lifespan is an appropriate measure to determine whether a sentence provides this meaningful opportunity. None of the evidence that appellants now point to provides any reason to use a different measure of lifespan for incarcerated persons; they certainly do not show the trial court's implied factual findings constituted an abuse of discretion, since appellants did not even provide this data to that court. Further, appellants' reliance on cases from other jurisdictions is misplaced because those courts either based their decisions on state law, or failed to consider the necessary link to whether the sentence amounted to a death judgment without any penological justification. For similar reasons, appellant Contreras is also mistaken in suggesting that he should not be given any lengthier period for parole

eligibility than would a murderer. Finally, even if this court were to conclude that appellant Contreras's 58 year term is otherwise too lengthy, this court should consider that the availability of good time credits effectively reduce that term.

A. A "Meaningful Opportunity to Obtain Release" Means That the Sentence Is Not the Equivalent of a Death Judgment and Provides an Opportunity to Demonstrate Rehabilitation

In *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), the United States Supreme Court provided the operative measure for determining the outer lengths of a juvenile's sentence: "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some *meaningful opportunity to obtain release* based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance." (*Id.* at p. 75, italics added.)

To understand more particularly what the court meant by a "meaningful opportunity," it is important to bear in mind two significant aspects of the *Graham* opinion and the Supreme Court's Eighth Amendment case law in general. First, the *Graham* rule depends on its equating the punishment to a capital sentence. As the *Graham* court carefully traced, prior to its decision the court's cases addressing proportionality of sentences fell within two general classifications: (i) challenges to the length of term-of-years sentences given all the circumstances in a particular case; and (ii) categorical restrictions on the death penalty. (*Graham, supra,* 560 U.S. at p. 59.) The holding in *Graham* was unique because it involved a categorical challenge to a term of years sentence. (*Id.* at p. 61.) In answering the *categorical* question whether the State of Florida could impose an LWOP term on a minor, the court relied on its categorical case law derived in the capital context. (*Id.* at pp. 61-62,

citing *Atkins v. Virginia* (2002) 536 U.S. 304, *Kennedy v. Louisiana* (2008) 554 U.S. 407, and *Roper v. Simmons* (2005) 543 U.S. 551.) Based on this jurisprudential foundation, it was therefore essential to the court's holding that it equated an LWOP term with the death penalty. Although recognizing that life without parole is the "'second most severe penalty'" and a death sentence is "'unique in its severity and irrevocability,'" the court concluded that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." (*Graham, supra*, at p. 69.) The court observed that life without parole deprives the offender of the most basic liberties without "hope of restoration" (except by the "remote possibility" of executive clemency). (*Id.* at p. 70 [noting that LWOP term "'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'"].)

Consistent with this equation of LWOP sentences to death, the *Graham* court emphasized that Graham had been denied "*any chance*" to demonstrate that he was fit to rejoin society (*id.* at p. 79, italics added), that Graham's sentence "*guarantee[d]*" that he would die in prison (*ibid.*, italics added), and that if the state imposes a sentence of life, it must provide the juvenile with "some realistic opportunity" to obtain release (*id.* at p. 82).

As the Supreme Court later recognized in *Miller v. Alabama* (2012) 560 U.S. __ [132 S.Ct. 2455] (*Miller*), *Graham*'s likening of an LWOP term to the death penalty was critical to its analysis because it provided the doctrinal vehicle by which the court incorporated its existing Eighth Amendment death penalty jurisprudence into a challenge to a term-of-years sentence: "*Graham* further likened life without parole for juveniles to the death penalty itself, thereby evoking a second line of our precedents. In those cases, we have prohibited mandatory imposition of capital

punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." (*Id.* at pp. 2463-2464; see also *id.* at p. 2467 ["That correspondence—*Graham*'s '[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment,' 560 U.S., at __, 130 S.Ct., at 2038–2039 (ROBERTS, C.J., concurring in judgment)—makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty"].)

Hence, under *Graham* and *Miller*, unless the penalty is tantamount to sentence of death, of which an LWOP is the functional equivalent for a juvenile, the doctrinal underpinnings for proportionality review are absent. Thus, the "meaningful opportunity" language in *Graham* must be understood as an opportunity to avoid a functional judgment of death. (See *People v. Caballero* (2012) 55 Cal.4th 262, 267-268 (*Caballero*) ["*Miller* therefore 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"].)

The second critical point to understanding the meaning of *Graham's* "meaningful opportunity" requirement is the court's examination of the potential theories of punishment that would justify a lengthy sentence for a juvenile, and *Graham's* rejection of each of those theories in the context of an LWOP sentence. The high court in *Graham* noted that, "[w]ith respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation [citation]—provides an adequate justification" for a term of life without parole. (*Graham, supra*, 560 U.S. at p. 71.) Particularly relevant to the present case is the court's discussion of rehabilitation as a potential goal. As the *Graham* court

explained, among other problems with a term of life without parole, it "improperly denies the juvenile offender a chance to demonstrate growth and maturity." (*Graham, supra,* 560 U.S. at p. 73.) A life sentence without parole "*forswears altogether* the rehabilitative ideal" because "[b]y denying the defendant the right to reenter the community, the State makes an *irrevocable judgment* about the person's value and place in society." (*Id.* at p. 74, italics added.) Moreover, at least in some states, a sentence of life without parole prevents rehabilitation because access to vocational training and other rehabilitative services are denied to such defendants. (*Ibid.*)

As the *Graham* court observed, "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." (*Graham, supra,* 560 U.S. at p. 71.) Correspondingly, to provide a "meaningful opportunity," a sentence must, at a minimum, entail at least some legitimate penological justification.

Against this backdrop, appellants' arguments for an expanded definition of a "meaningful opportunity" may be readily rejected. Appellant Rodriguez insists that "a juvenile offender should not be required to wait until the very end of his or her life for the first opportunity to demonstrate. . . reform." (RBOM 15.) He contends that setting a parole hearing shortly before a defendant is statistically likely to die would "repudiate" the core principles under *Graham* that children can reform, and render that decision's "meaningful opportunity" mandate essentially meaningless. (*Ibid.*) Appellant Contreras asserts that it is "safe to assume" that a teenager in his position has "little to no" incentive to become a responsible individual. (CBOM 20.) Respondent disagrees. Both appellants fail to recognize the significant penological difference between a term in which parole is possible, and one in which it is not. They would extend the *Graham* rule to situations that are not the equivalent of a death

sentence, and hence lack the doctrinal foundation that forms the basis for the *Graham* rule.

The concerns that motivated the *Graham* court regarding the lack of rehabilitation as a penological justification in the case of an LWOP are not present in the case of a term that provides for a parole hearing within the offender's lifetime. When a juvenile is given a lengthy term that provides an opportunity for life outside prison walls, even if that time may be short or may fall at the end of a juvenile's life, the juvenile is given a chance to show his or her redemption. A defendant in such a situation has the potential to demonstrate growth and maturity and prove to all that he or she has reformed. Such a sentence does not "foreswear[] altogether" all rehabilitative goals or make an utter and "irrevocable" judgment about the person's value or place in society. (Cf. *Graham, supra*, 560 U.S. at p. 79.) Finally, neither appellant suggests that he lacks access to vocational training or other rehabilitative services as a result of his sentence. In short, the prospect of parole provides hope. And while appellant Contreras may simply dismiss this hope out of hand as lacking an adequate incentive (CBOM 20), he fails to grapple with these penological and doctrinal distinctions between a person such as Graham who had "no chance" to leave prison (*Graham, supra*, 560 U.S. at p. 79), and one such as himself who has such a chance.

More recently, the Supreme Court has confirmed this interpretation of *Graham*. The court has reiterated that juvenile defendants "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their *hope for some years of life* outside prison walls must be restored." (*Montgomery v. Louisiana* (2016) __U.S. __ [136 S.Ct. 718, 736-737] (*Montgomery*), italics added.) Once again, the court did not say that juvenile defendants must be given an opportunity for a meaningful life outside of prison. And unlike the rule advocated by appellant Contreras

(CBOM 27), the *Montgomery* court certainly did not say that such defendants must be given an opportunity to raise a family. Instead, the "hope for some years of life outside prison walls" is obviously much more limited. Where there is hope of some years outside prison, it cannot be said the sentence is tantamount to a death judgment, even if the years outside prison are few. Because it is not a death judgment, the doctrinal foundation behind the *Graham* rule simply does not apply.[1]

B. The Hearing Provided in Penal Code Section 3051 for Certain Offenders Who Have Served 25 Years Satisfies the Requirements of a Meaningful Opportunity for Release, But Does Not Create a Constitutional Ceiling on the Length of a Sentence

Appellant Rodriguez correctly notes that the Legislature designed Penal Code section 3051[2] to bring juvenile sentencing into conformity with the requirements of *Graham*, *Miller*, and *Caballero* that a youthful offender be given an opportunity to demonstrate he or she has been rehabilitated and gained maturity. (RBOM 20.) This court reached a similar conclusion in *People v. Franklin* (2016) 63 Cal.4th 261, 277 (*Franklin*). As this court discussed in *Franklin*, section 3051 generally requires the Board of Parole Hearings to conduct a youth offender parole hearing during the 15th, 20th or 25th year of a juvenile offender's incarceration (§ 3051, subd. (b)), but it excludes several categories of juvenile offenders from eligibility for such a hearing, including those who are sentenced under the Three Strikes Law

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[1] In its Opening Brief on the Merits, respondent previously suggested that any term of imprisonment that provides a juvenile offender an opportunity for parole within his or her natural lifetime is not the functional equivalent of an LWOP and is therefore constitutional. Given the facts of this case, in which the parole dates provide the opportunity for some years outside prison based on appellants' anticipated lifespans, this court is not confronted with more difficult questions surrounding parole dates at the very end of the offender's natural lifetime.

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

(§§ 667, suds. (b)-(i), 1170.12) or Jessica's Law (§ 667.61), as well as those who are sentenced to life without parole, and those who, after turning 23 years of age, commit another offense in which malice aforethought is required or for which that person is sentenced to life in prison. (§ 3051, subd. (h).)

Appellant Rodriguez reasons that because the Legislature concluded that a hearing after serving 25 years satisfies *Graham's* "meaningful opportunity" requirement, this court should hold unconstitutional any sentence that provides for a hearing after this date. (RBOM 20.) This argument, however, involves an unwarranted leap in logic. That the Legislature established a given parole opportunity as sufficient to satisfy the Constitution does not demonstrate it thereby established a necessary maximum date for such a hearing.

Respondent recognizes that in *Franklin* this court summarized that "[s]ection 3051 thus reflects the Legislature's judgment that 25 years is the maximum amount of time that a juvenile offender may serve before becoming eligible for parole." (*Franklin, supra*, 63 Cal.4th at p. 278.) Likewise, this court also stated that "[t]he statute establishes what is, in the Legislature's view, the appropriate time to determine whether a juvenile offender has 'rehabilitated and gained maturity' (Stats. 2013, ch. 312, § 1) so that he or she may have 'a meaningful opportunity to obtain release' (§ 3051, subd. (e))." (*Ibid.*)

But while the Legislature determined that the maximum period of 25 years established for most offenses would be sufficient to satisfy cases such as *Graham*, *Miller* and *Caballero*, the Legislature did not conclude that any lengthier period of time would violate those cases. Indeed, the contrary is true. Had the Legislature determined that a meaningful opportunity for release could be established only if a parole hearing were held within 25 years, the Legislature would not have excluded certain offenders sentenced

under the Three Strikes law and Jessica's law, or those who committed a second crime involving malice aforethought. To conclude otherwise would mean that the Legislature, after recognizing that a period of 25 years was the maximum amount that a juvenile offender could serve and still provide a meaningful opportunity to obtain release, nonetheless chose to violate this constitutional requirement in the case of certain types of offenders. Such a conclusion would violate the well-accepted cannon that "[i]n ascertaining the Legislature's intent, we attempt to construe the statute to preserve its constitutional validity, as we presume that the Legislature intends to respect constitutional limits." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1146.)

While the Legislature believed a hearing after 25 years would be sufficient to satisfy the requirements of the Constitution, other hearings at later dates may also be sufficient. The Legislature was presumably well aware of cases interpreting the requirement of a meaningful opportunity. (See, e.g., *People v. Landry* (2016) 2 Cal.5th 52, 68 [Legislature presumptively aware of cases interpreting statute]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1133 [Legislature aware of decisional background when it enacted statute].) Cases such as *People v. Perez* (2013) 214 Cal.App.4th 49, 57, had previously held that "[t]here is a bright line between LWOPs and long sentences with eligibility for parole if there is some meaningful life expectancy left when the offender becomes eligible for parole." As the *Perez* court determined, "[h]ow much life expectancy must remain at the time of eligibility for parole of course remains a matter for future *judicial development*. . . ." (*Ibid.*, italics added.) In that case, the court could "safely say" that the defendant would have such a meaningful opportunity because he would be eligible for parole by age 47. (*Ibid.*) Like the present case, *Perez* involved a One Strike offense. (*Ibid.*) Nothing suggests the Legislature sought to overturn *Perez's* determination that a

sentence of 30 years to life, and a parole hearing by age 47, would satisfy the Constitution, or that the Legislature instead determined that a 16-year old defendant like Perez was entitled to a hearing no later than at age 41, or 25 years after the defendant was sentenced.

Rather than conclude that the Legislature established a constitutional minimum and then in the very next step violated that minimum, the more reasonable conclusion is that the Legislature agreed with *Perez* that the outer length of certain sentences should be left for judicial development and that the Legislature had a rational basis for excluding One Strike offenses, among others, as posing a heightened risk of recidivism. (See *People v. Bell* (2016) 3 Cal.App.5th 865, 876-880 [Legislature had rationale basis for not including One Strike offenses within right to youthful parole hearing under section 3051].)[3] Rather than create a single right to parole hearing for these offenders, the Legislature left it to the courts to fashion a term that would comply with existing sentencing laws but still provide an opportunity for youthful offenders to demonstrate rehabilitation. (See *id.* at pp. 875-876 [holding parole eligibility at age 55 is not a de facto LWOP].)

C. Appellants' Parole Dates Would Provide Hope of More Than Just a Few Years Outside Prison Walls

Appellants' opportunities for parole would fall well within their anticipated lifespans based upon statistics from the Center for Disease Control. Contrary to appellants' view, these statistics are an appropriate measure of their anticipated lifespans. In *Caballero, supra,* 55 Cal.4th 262, this court looked to whether the defendant's "parole eligibility date ... falls outside [his] natural life expectancy...." (*Id.* at p. 268.) It defined "life expectancy" as "the normal life expectancy of a healthy person of

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[3] This court granted review of the *Bell* decision on January 11, 2017. (Case no. S238339.) It is therefore cited solely for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).)

defendant's age and gender living in the United States." (*Id.* at p. 267, fn. 3.) Appellants both seek to back away from this rule.

Appellant Rodriguez argues that any life expectancy approach should take into account the diminished life expectancy of prisoners in California, as well as their personal backgrounds and health histories. (RBOM 16-17.) Without seeking judicial notice, appellant Rodriguez cites a study purporting to establish that the "average age of death for all inmates" in 2014 was 56 years old. (RBOM 16-17.) Appellant Contreras relies on the same study (again without requesting judicial notice) to show that "[t]he average age of death in 2014 is 56—nearly 20 years younger than the average for males nationwide." (CBOM 22.) The study they cite, however, only examines the average age of those who died in prison—some 319 persons out of the entire prison population of over 135,000; it does not purport to state the average life expectancy, or conversely the average age of death for all inmates, including those who served their full terms and were released. It is, of course, far different to say that the average age of those who died is 56 and the average age of death of all prisoners is 56.[4] Appellants fail to show that these statistics are inconsistent with the national averages cited by respondent.

Appellant Rodriguez also cites a case, *United States v. Taveras* (E.D. N.Y. 2006) 436 F.Supp.2d 493, 500, which concluded that "[l]ife expectancy within federal prison is considerably shortened." That case,

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[4] See 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_DeathReviewAnalysisYear2014_20150730.pdf. Respondent objects to any implied motion to take judicial notice of this document on the grounds that it is irrelevant. Similar objections apply to appellant Rodriguez's reliance on Department of Justice statistics to show the average age of those who died due to natural causes. (RBOM 17.)

however, made no attempt to specify to what degree life is shortened, let alone to what degree this is so in California state prisons.

Ultimately, in *Caballero* this court adopted a statistical approach based on "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.) This categorical response is entirely consistent with the categorical underpinnings of the *Graham* rule itself. Under this categorical approach, it was not necessary for this court to consider the particularities of the individual, such as the health or race of that person. In order to give a defendant hope of some years outside prison, it is enough that a normal, healthy person would survive long enough to receive this opportunity.

To the extent appellants challenge the *Caballero* test, they seek to make life expectancy an individualized determination such as might be made in a tort action. (See generally *Allen v. Toledo* (1980) 109 Cal.App.3d 415, 424 [wrongful death action].) This approach is contrary to the categorical nature of *Graham* and unnecessary to give the defendant hope of some years on parole.[5] But even if appellants were correct, then life expectancy would become a factual question for the trial court to resolve. In the sentencing context, questions of fact are generally determined by the trial court and reviewed for substantial evidence on appeal. (See, e.g., *People v. Trinh* (2014) 59 Cal.4th 216, 236 [superior court's legal conclusions are reviewed de novo and its findings of fact for substantial evidence].) Here, the People presented evidence regarding appellants' statistical life expectancies. (4CT 893; 6CT 1671.) Neither appellant presented any evidence in the trial court to demonstrate that their

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[5] Appellant Rodriguez's arguments regarding the difficulties of presenting arguments regarding an individual's particular life expectancy (RBOM) are presumably one more reason why this court declined to take such an approach.

statistical life expectancies were shorter than the data introduced by the prosecution. To the contrary, while briefly questioning whether life expectancies for persons in prison were as high as for those on the outside (16RT 2907), trial counsel for appellant Rodriguez acknowledged that "under *Caballero*, this court could legally sentence [appellant] to 50 years to life. I agree with that." (16RT 2909.) The trial court impliedly adopted the People's evidence. (16RT 2914.)[6] Nothing that appellants now cite demonstrates that the statistics supplied by the National Center for Health Statistics and cited by respondent in its Opening Brief on the Merits are inaccurate as applied to state prisoners in California, let alone so inaccurate that using them as a benchmark to define the outer contours of a life sentence would rob the defendant of all *hope* of some years outside prison walls.

Appellant Rodriguez insists that reliance on such statistics would encourage racial and gender disparity in sentencing. (RBOM 19.) Respondent disagrees. In *Caballero*, this court did not find it necessary to define life expectancy based on race. (*Caballero, supra*, 55 Cal.4th at p. 267 fn. 3.) And while it is perhaps theoretically possible that a person could claim he or she received a lengthier sentence based on gender, neither appellant makes such an equal protection claim here.

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[6] Respondent notes that the trial court mistakenly believed at one point that appellant Rodriguez would be eligible to receive good time credits in prison under section 2933.1, making him eligible for parole at age 58. (16RT 2907.) Defense counsel, however, disputed this assertion, and the court acknowledged that it "probably doesn't change" the analysis. (16RT 2907.) Section 3046 requires that both appellants serve the minimum term of 50 years before being eligible for parole. As discussed below, only appellant Contreras could receive credits for his determinate term.

Appellant Contreras correctly notes that even if the average age of death is 76.2, then a significant number of offenders will statistically not live to that age. (CBOM 22.) Respondent does not dispute this basic proposition of mathematics.[7] However, this misses the point. The state "need not guarantee the offender eventual release"; instead it need only provide a "realistic opportunity" to obtain release before the end of a life term. (*Graham, supra,* 560 U.S. at p. 82.) Providing a parole hearing within the life span of an average person creates a realistic opportunity for release.

Finally, appellant Contreras argues that a juvenile defendant sentenced to 58 years to life will serve longer and harder time than an adult sentenced to the same sentence. (CBOM 26-28.) This argument, however, is based on a false premise. As the trial court made clear, had appellants been adults, they would have received sentences in excess of 200 years to life and would never have *any* opportunity for release. (See 16RT 2916, 2927, 2938 ["If I could sentence you to 640 years to life, I would have. . ."].)

Accordingly, appellants have not stated any persuasive reason for this court to reconsider its ruling in *Caballero*. Under the *Caballero* rule, a sentence is the functional equivalent of a term of life without parole if it falls outside the defendant's natural life expectancy. Appellants' life expectancies are approximately 76.2 years. (See OBOM 9.) They have failed to demonstrate that the trial court abused its discretion by relying on similar statistics. Because appellant Rodriguez would have roughly ten years outside prison, and appellant Contreras over two years, they would

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[7] Respondent notes, however, that appellants improperly rely on statistics regarding longevity at the time of birth. (CBOM 23; RBOM 14 [citing life expectancy of 72.5 years].) This is an improper basis of comparison for someone like appellants who had already survived the first 16 years of life.

have "hope for some years of life outside prison walls" (*Montgomery, supra*, 136 S.Ct. at pp. 736-737), and therefore their terms do not violate the Eighth Amendment.

D. Appellants' Reliance on Sister State Decisions Is Misplaced

Appellant Contreras seeks to support his position by reference to decisions in several sister states. (CBOM 23-26.) None of those decisions is particularly useful. "Decisions of the courts of other states are only regarded as 'persuasive ... depending on the point involved.'" (*Labrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1077, citing 9 Witkin, California Procedure (4th ed. 1997) Appeal, § 940, p. 980.) Reference to the decisions of other states in this regard is particularly difficult because of the differences in sentencing schemes and the underlying crimes involved. For instance, both appellants rely on *State v. Null* (Iowa 2013) 836 N.W.2d 41, 45, which remanded for resentencing the case of a 16-year-old convicted of first-degree murder who would have been first eligible for parole at age 69 and 4 months. Notably, in reaching this result the court expressly recognized that "the evidence in this case does *not* clearly establish that Null's prison term is beyond his life expectancy." (*Id.* at p. 71, italics added.) However, the *Null* court specifically rejected this court's decision in *Caballero* as well as other courts that had concluded that "whether potential release might occur within a defendant's life expectancy is a key factual issue." (*Ibid.*) While relying on general principles underlying the federal high court's decisions in *Graham* and other cases, the *Null* court expressly grounded its decision "independently" under the Iowa state constitution. (*Id.* at p. 70.) As the Iowa Supreme Court subsequently acknowledged, the *Null* decision applied these federal principles in a more "stringent fashion" under state law than had previously by "explicitly adopted" by the United States Supreme Court. (*State v. Lyle*

(Iowa 2014) 854 N.W.2d 378, 384.) In fact, Iowa has gone even further by holding that all mandatory minimum sentences for youthful offenders violate its state constitution (*id.* at p. 380)—a position the California Legislature rejected in enacting section 3051 and this court upheld in *Franklin.*

Thus, far from supporting appellants' position, *Null* demonstrates that similar to the age 69 parole eligibility in that case, appellants' terms fall within their normal life expectancies. *Null's* rejection of *Caballero* under state law grounds provides no reason for this court to reevaluate the decision it reached less than five years ago.

Notwithstanding the *Null* court's reliance on the Iowa state constitution, the Supreme Court of Wyoming chose to follow that decision in *Bear Cloud v. State* (Wyo. 2014) 334 P.3d 132, 142 (*Bear Cloud*). There, 16-year old Bear Cloud committed several crimes, including murder, and was sentenced to a term that would have required he serve at least 45 years, making him eligible for parole at age 61. (*Id.* at p. 136.) Like *Null*, the court declined to "make any projections" regarding the defendant's life expectancy, noting that Michigan data "seem[ed] to demonstrate" that life expectancy of incarcerated youthful offenders is "significantly reduced" compared to that of the general population. (*Id.* at p. 142.) The court pointed out that the United States Sentencing Commission equates a term of 39.17 years to a life sentence. (*Ibid.*) Ultimately, the court concluded, as had *Null* before it, that "[a] juvenile offender sentenced to a lengthy aggregate sentence 'should not be worse off than an offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*.'" (*Ibid.*, quoting *Null*, 836 N.W.2d at 72.)

Unlike Iowa or Wyoming, however, the California Legislature has made a different determination that certain offenders such as appellants pose a greater risk of recidivism, and therefore there is a rational basis for

giving them a later parole date than murderers. (See *People v. Bell*, *supra*, 3 Cal.App.5th at pp. 876-880.) Given this rational basis, the question of the appropriate term is ultimately the prerogative of the Legislature. (See *Harmelin v. Michigan* (1991) 501 U.S. 957, 998 (conc. opn. of Kennedy, J.) ["fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts'"]; *People v. Turnage* (2012) 55 Cal.4th 62, 74 ["It is both the prerogative and the duty of the Legislature to define degrees of culpability and punishment. . . "].) Nothing in *Bear Cloud* undermines that legislative determination or suggests it is irrational.[8]

In *State v. Macon* (La. Ct. App. 2012) 86 So.3d 662, the court concluded that a 50-year term that would render the juvenile defendant eligible for parole at age 67 did not satisfy *Graham*'s requirement of a meaningful opportunity to obtain release. However, the court simply asserted this conclusion without attempting to justify or explain it in any manner. (*Id.* at p. 665.) In any event, the Louisiana Supreme Court subsequently undermined this conclusion by holding (contrary to *Caballero*) that *Graham* applies only to sentences of life in prison without parole, and does not apply to a sentence of years without the possibility of parole. (*State v. Brown* (La. 2013) 118 So.3d 332, 332-333.)

Respondent recognizes that recently the Supreme Court of New Jersey has concluded that sentences permitting parole eligibility at ages 72 and 85 were the practical equivalents of life without parole. (*State v. Zuber* (N.J. 2017) __A.3d __ [2017 WL 105004] (*Zuber*).) The *Zuber* court concluded it would be inappropriate for judges to resort to general life expectancy

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[8] For similar reasons, appellant Contreras's reliance on Florida's legislative solution (CBOM 23-24) does not demonstrate that California's alternative legislative solution is either wrong or unconstitutional.

tables when determining the overall length of a sentence, because those tables rest on only estimates, and not firm dates, and could also raise constitutional questions by relying on race and gender. (*Id.* at *16.) Consequently, the court concluded that judges must consider the *Graham/Miller* factors of youth whenever sentencing a juvenile to a "lengthy" aggregate sentence that amounts to life without parole, but the court did not define when such a lengthy term was the functional equivalent of a LWOP. (*Ibid.*)

Respondent also recognizes that in *Casiano v. Commissioner of Correction* (2015) 317 Conn. 52 (*Casiano*), the Supreme Court of Connecticut held that the *Miller* requirements apply to a juvenile offender's 50 year sentence. (*Id.* at p. 54.) In reaching this conclusion, the court rejected the notion that in order for a sentence to be deemed "life imprisonment," it must continue until the "literal end of one's life." (*Id.* at p. 75.) Noting that a juvenile offender would typically not have established a career, married, or raised a family, the court concluded that upon release, he or she would have irreparably lost the opportunity to "engage meaningfully" in many of these activities. The court concluded that *Miller* and *Graham* viewed the concept of life more broadly than simple "biological survival," and embraced the concept that an individual is effectively incarcerated for life "if he will have no opportunity to truly reenter society or have any meaningful life outside of prison." (*Id.* at p. 78.) As discussed below, neither *Zuber* nor *Casiano* is persuasive.

Other decisions not cited by appellants have held that sentences similar to those appellants received do not violate *Graham* because they fall within the defendant's natural life expectancy. (See, e.g., *People v. Reyes* (Ill. 2016) 63 N.E.3d 884, 889 [Minimum term of 32 years before parole is not a de facto life sentence]; *State v. Logan* (2015) 160 Conn.App. 282 [31-year sentence is not the functional equivalent of a life term]; *People v.*

Lehmkuhl (Colo. Ct. App. 2013) 369 P.3d 635, 638 (review granted, then dismissed on March 16, 2016) [Relying on CDC statistics, court upheld term providing for parole eligibility at age 67; court concluded *Graham* does not require a certain interval of time between a defendant's parole eligibility date and his or her life expectancy]; *Austin v. State*, 127 So.3d 1286, 1287 (Fla. Ct. App. 2013) [45-year sentence with a 45-year minimum mandatory does not exceed life expectancy and therefore is not a de facto life sentence]; *Thomas v. State* (Fla. Ct. App. 2011) 78 So.3d 644, 646 [Concluding concurrent 50-year sentences were not the functional equivalent of life sentences, court noted "[a]s found by the trial court, Appellant would be in his late sixties when he is released from prison if he was required to serve the entirety of his sentence. Thus, Appellant's sentence is not equivalent to life imprisonment without the possibility of parole"]; cf. *Brown v. State* (Ind. 2014) 10 N.E.3d 1, 8 [court reduced 150 year sentence, which denied all hope of release from prison, to 80 years].)

In sum, ipse dixit pronouncements of what constitutes a life term, or its functional equivalent, are of little use. Cases such as *Null*, *Bear Cloud*, *Mason*, *Casiano* and *Zuber* tend to focus on the manner in which children differ from adults, such as their lack of maturity, or underdeveloped sense of responsibility, which can lead to recklessness, impulsivity and heedless risk-taking. (See *Graham*, *supra*, 560 U.S. at p. 68.) Respondent does not disagree with these distinctions, or that as a result a juvenile's transgressions are "'not as morally reprehensible as that of an adult.'" (*Ibid.*, quoting *Thompson v. Oklahoma* (1988) 487 U.S. 815, 835.) But the focus on such distinctions cannot untether the analysis from *Graham's* core categorical analysis likening life without parole sentences to the death penalty. (See *Miller*, *supra*, 132 S.Ct. at p. 2467.) Simply recognizing that children are different from adults does not give rise to the Eighth Amendment's categorical proscriptions on punishments that can be likened

to death. At the point that a sentence is no longer analogous to the death penalty, the high court's case law demanding individualized sentencing in capital cases no longer becomes relevant. Thus, it is not sufficient to show simply that juveniles are less culpable than adults; the question of a categorical bar only arises if the sentence is a functional equivalent of an LWOP, which in turn is sufficiently similar to the death penalty.

To answer this question, as the court did in *Graham*, requires consideration of whether there are penological purposes that justify the term. As respondent has shown above, the concerns regarding the absence of rehabilitation that informed *Graham's* holding regarding the equivalency of LWOP and death are either absent or largely mollified when there is hope of even a short window outside prison walls.

None of the cases noted above addresses the distinctions between a lengthy term of years and an LWOP as they bear upon the question of rehabilitation. Moreover, cases such as *Casiano* and *Zuber* highlight the danger of unmooring the question of what is the functional equivalent of a life term from the Eighth Amendment jurisprudence that formed the basis for *Graham* and *Miller*. Courts would be forced to address when a "lengthy" sentence is too lengthy, and what quality of life a juvenile is entitled to. Certainly nothing in *Montgomery's* "hope of some years" outside prison would suggest that anything more than a temporal analysis is required.

To be sure, some of those courts reflect skepticism with using longevity statistics that do not necessarily apply to persons confined to prison. But as previously noted, neither appellant disputed the prosecution's factual evidence presented in the court below. Even if there is some unquantified difference with persons confined to California prisons, and those who are outside prison walls, appellants do not demonstrate that

the trial court's reliance on longevity statistics was unreasonable or that the differences are so significant as to remove all hope of eventual release.

E. Appellants Are Not Entitled to an Earlier Parole Date Based on Proceedings Available for Murders

Appellant Contreras maintains that because he and appellant Rodriguez have less culpability than juvenile murderers, they are entitled to at least the same opportunities for parole as murderers. (CBOM 31-32.) True, in *Graham* the Supreme Court stated that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." (*Graham, supra*, 560 U.S. at p. 69.) The court also noted that although rape and robbery are serious offenses, they "differ from homicide crimes in a moral sense." (*Ibid.*) But it would be wrong to conclude that the court thereby created a proportionality limitation that prevents a rapist from receiving a greater sentence than a murderer in a given case, even when juveniles are involved. As previously noted, the categorical holding of *Graham* is limited to situations in which the sentence is equivalent to a death sentence. Where this is not true—that is, where the sentence is not a functional LWOP—then the limitations of *Graham* do not apply. "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." (*Rummel v. Estelle* (1980) 445 U.S. 263, 272.)

The narrow proportionality principle in the Eighth Amendment is reserved for extreme sentences that are grossly disproportionate to the offenses committed by the defendant. (*Ewing v. California* (2003) 538 U.S. 11, 20.) Article 1, section 17 of the California Constitution requires consideration of three factors for courts when analyzing whether a sentence is cruel or unusual: (1) the degree of danger the offender and the offense pose to society; (2) how the punishment compares with punishments for

more serious crimes; and (3) how the punishment compares for the same offense in other jurisdictions. (*People v. Dillon* (1983) 34 Cal.3d 441, 479-482; *In re Lynch* (1972) 8 Cal.3d 410, 425-427.) California courts have long upheld One Strike sentences against cruel and unusual punishment challenges. (See, e.g., *People v. Crooks* (1997) 55 Cal.App.4th 797, 803-812 [25-years-to-life sentence for aggravated rape, where the defendant had no prior felonies and caused no great bodily injury, was not disproportionate]; *People v. Estrada* (1997) 57 Cal.App.4th 1270, 1281-1282 [25-years-to-life sentence for one forcible rape during a burglary, without use of a weapon and with no prior felonies, held not disproportionate]; *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230-1232 [upholding sentence of 135 years pursuant to One Strike law]; *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1310 [195 year sentence not disproportionate].)

Here, appellants committed multiple horrific offenses against two separate victims. Under these circumstances, it is for the Legislature to determine whether a One Strike offender poses a greater risk to society or, as a result of the potential for recidivism, requires a lengthier term of incarceration before parole. (See *Ewing v. California*, *supra*, 538 U.S. at p. 25 ["Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts"].) Unlike Iowa or Wyoming, the California Legislature has specifically addressed this question and has specifically declined to apply the same cap on parole eligibility to One Strike offenders as it has to murderers. (§ 3051.) Given that the Legislature has spoken (see *People v. Bell*, *supra*, 3 Cal.App.5th at pp. 876-880), this court should not supplant the will of the Legislature by creating a rule of its own.

F. In Any Event, Appellant Contreras Was Given the Opportunity for an Earlier Parole Date

Even if this court were to conclude that a parole date at age 74 is otherwise outside the range of what would give appellant Contreras hope of a few years outside prison walls, based on the potential for good time credits the date of his potential parole eligibility at the time of sentencing was actually at age 73. Unlike the defendant in *Franklin* who committed murder, and therefore would not otherwise have been eligible for parole until he turned 66 (*Franklin, supra*, 63 Cal.4th at p. 273), appellant Contreras is eligible to receive good time credits of up to 15 percent on his determinate eight-year term. (Pen. Code, § 2933.1, subd. (a).) This would mean that he could reduce his sentence by roughly 14 months. (See *People v. Perez, supra*, 214 Cal.App.4th at p. 57 [relying on credits already earned to determine date of actual parole eligibility of juvenile].)[9]

Respondent recognizes that good time credits do not affect the length of a court-imposed sentence and may be revoked at any time before the date of a defendant's release. (*Pepper v. United States* (2011) 562 U.S. 476, 501 fn. 14.) One court has therefore held that the potential award of good time credits cannot be used to determine whether the defendant would have the potential for a meaningful opportunity for release. (*Bear Cloud, supra*, 334 P.3d at p. 136, fn. 3.) However, the *Bear Cloud* decision was decided before the high court's decision in *Montgomery*. In *Montgomery*, the Supreme Court held that a state can remedy a *Miller* violation by permitting juvenile defendants to be considered for parole, rather than resentencing them. (*Montgomery, supra*, 136 S.Ct. at p. 736.) Thus, the meaningful opportunity need not be part of the original sentence, so long as the

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[9] Appellant Contreras also received 76 days of presentence credits under section 2933.1, for a total of 588 days' credit. (16RT 2937.)

defendant is ultimately given a meaningful opportunity. It follows that the fact that good time credits are not part of the original sentence is of no moment. What is important is that the juvenile would be given a meaningful opportunity not only to obtain an earlier release, and thereby avoid a potential life term, but also demonstrate rehabilitation. Accordingly, the opportunity to earn good time credits should be taken into consideration and not ignored when determining whether there is a "meaningful opportunity to obtain release."

II. EVEN IF THIS COURT WERE TO FIND THAT APPELLANTS' SENTENCES CONSTITUTE THE FUNCTIONAL EQUIVALENT OF AN LWOP, THE APPROPRIATE REMEDY WOULD NOT BE TO ISSUE AN UNAUTHORIZED TERM

Appellant Contreras maintains that this court should remand the case for resentencing with an order that the trial court is not bound by any mandatory sentencing scheme and that after considering each appellant's age and other factors, the court may not impose a term greater than 25 years to life. (CBOM 32.) Appellant Rodriguez suggests that he must be given an opportunity to demonstrate his rehabilitation after no more than 25 years; alternatively, he urges that this court should affirm the decision of the Court of Appeal, which would require the trial court to select a parole date when appellants would have a reasonable first opportunity to demonstrate maturity and rehabilitation. (RBOM 21.) Contrary to appellants' arguments, in the event either or both of their sentences constitute de facto LWOP terms, the appropriate remedy is to remand the matter to the trial court to select a date for a parole hearing that would fall within their life expectancies.

Caballero and *Franklin* provide the appropriate scope of any remand in the present case. After determining that a term of 110 years to life provided no meaningful opportunity for release within the defendant's natural lifetime, this court in *Caballero* concluded that "[d]efendants who

were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for writs of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings." (*Caballero*, *supra*, 55 Cal.4th at p. 269.)

Later, in *Franklin*, this court affirmed Franklin's sentence, but remanded the case to afford him an adequate opportunity to make a record of information that would be relevant to the Board when it fulfills its statutory obligations under sections 3051 and 4801. (*Franklin*, *supra*, 63 Cal.4th at pp. 286-287.) Notably, this court also held that Franklin's two consecutive 25-years-to-life sentences remain valid, even though section 3051 made him eligible for parole after 25 years. (*Id.* at p. 269.) Noting that section 122053, subdivision (h), one of the provisions under which Franklin was sentenced to a life term, prevented a court from striking the enhancement, this court specifically saw "no basis for rewriting" that statutory provision to allow the trial court to strike the enhancement. (*Id.* at p. 279.)

Based on *Caballero*, if appellants' sentences constitute de facto LWOP terms, the appropriate remedy would be to remand to the trial court to select an appropriate parole date that would fall within appellants' lifespans. It would not be appropriate, as *Franklin* further instructs, to strike either of the One Strike sentences. As the trial court noted, appellants were not entitled to a "free victim." (16RT 2935.) Section 667.61, subdivision (i), mandates that appellants receive consecutive sentences because the underlying counts involved separate victims. (See generally *People v. Rodriguez* (2012) 207 Cal.App.4th 204, 214.) Similarly, it would also not be appropriate to strike either of the section 12022.3 enhancements imposed on appellant Contreras. (See § 667.61, subd. (g)

[prohibiting court from striking any such enhancement under subdivision (d)(6)].) Respondent notes, however, the court could reduce each of the four-year enhancements to three years. (§ 12022.3, subd. (a).)

CONCLUSION

Accordingly, for the reasons stated above, respondent respectfully requests this court reverse the decision of the Court of Appeal and affirm the trial court's sentence.

Dated: February 6, 2017

Respectfully submitted,

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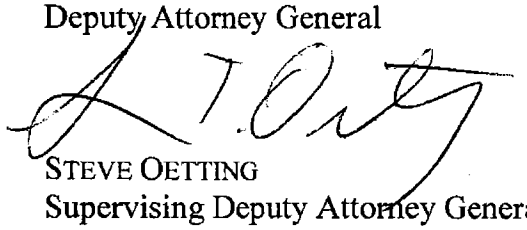

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF uses a 13 point Times New Roman font and contains 8,256 words.

Dated: February 6, 2017

XAVIER BECERRA
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Leonel Contreras, et al & William Rodriguez, et al** -- No.:**S224564**

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 February 7, 2017, I served the attached ***REPLY BRIEF*** 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 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows, and/or electronically via TrueFiling, as specified below:

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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 February 7, 2017, at San Diego, California.

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Declarant

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