IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. RODRIGO CABALLERO Defendant and Appellant.	Case No. S190647

Second Appellate District, Division Four, Case No. B217709
Los Angeles County Superior Court, Case No. MA043902
The Honorable Hayden Zacky, Judge

APPLICATION OF PACIFIC JUVENILE DEFENDER CENTER FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF ON BEHALF OF APPELLANT RODRIGO CABALLERO, AND *AMICUS CURIAE* BRIEF

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The Pacific Juvenile Defender Center, through their attorneys and pursuant to California Rules of Court, rule 8.520(f), respectfully applies for leave to file the following *amicus curiae* brief on behalf of appellant Rodrigo Caballero.

The issue in appellant's case concerns whether a sentence, imposed on a juvenile convicted of committing non-homicide offenses, that exceeds an offender's life expectancy is the functional equivalent of a life sentence without the possibility of parole, under the Eighth Amendment within the meaning of *Graham v. Florida* (2010) 560 U.S. 825. The issue has statewide – if not national – importance.

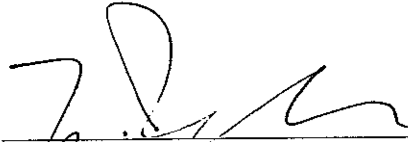
The Pacific Juvenile Defender Center is the regional affiliate for California and Hawaii of the National Juvenile Defender Center based in Washington, D.C. PJDC works to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. PJDC provides support to juvenile trial lawyers, appellate counsel, law school clinical programs and non-profit law centers to ensure quality representation for children throughout California and Hawaii. PJDC offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building and policy development. PJDC's Amicus Committee is composed of representatives from various children's advocacy agencies and defender organizations located throughout California and Hawaii. Collectively, our members represent thousands of children in delinquency and dependency courts. PJDC has long been concerned about the handling of youth in the adult criminal justice system, as well as the plight of young people with serious mental health issues. We are knowledgeable about the impact of age, immaturity and mental health disorders on behavior and in relation to adjudicative competence and capacity for rehabilitation.

The court in this case sentenced Rodrigo Caballero to three consecutive life terms totaling 110 years to life for three counts of

attempted murder, with enhancements. He was only 16 years old at the time of the offenses, was schizophrenic, and had no criminal history.

The expertise of *amici* will provide a perspective that has not been presented to the court in this matter. *Amici* do not intend to duplicate arguments already made, but will present additional legal arguments and authority.

Respectfully Submitted,



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ARGUMENT

APPELLANT'S AGE AT THE TIME OF THE OFFENSES, HIS MENTAL ILLNESS, AND HIS PROBABLE INCOMPETENCY RENDER HIS 110 YEAR SENTENCE FOR NON-HOMICIDE OFFENSES CRUEL AND UNUSUAL PUNISHMENT UNDER THE CALIFORNIA CONSTITUTION.

A. Introduction

A term-of-years sentence that exceeds a teenager's life expectancy is the functional equivalent of a life sentence without the possibility of parole within the meaning of *Graham v. Florida* (2010) 560 U.S. 825, __, 130 S.Ct. 2011 (*Graham*). Such a "de facto" life without parole sentence for a juvenile nonhomicide offender precludes a "meaningful opportunity for release" and represents a "judgment at the outset that [the] offender[] never will be fit to reenter society." (*See id.*, 130 S.Ct at p. 130.) Such sentences were categorically barred by the United States Supreme Court in *Graham.* Accordingly, *amici curiae* agree with appellant that a sentence of 110 years to life for a juvenile convicted of committing non-homicide offenses constitutes cruel and unusual punishment under the Eighth Amendment

While we agree with appellant that this issue is dispositive, we also submit this brief to highlight the fact that appellant's sentence is also unconstitutionally excessive under the California Constitution, as it violates our state prohibition against cruel or unusual punishment. (Cal. Const., art. I, § 17.) Under California's proportionality test as set forth in *In re Lynch*

(1972) 8 Cal.3d 410 and *People v. Dillon* (1983) 34 Cal.3d 441, the Court may consider the nature of the offense and the offender to determine whether a sentence is grossly disproportionate to the crime. (*Lynch, supra,* 8 Cal.3d. at p. 425.) Rodrigo Caballero's age, his mental illness, his probable incompetency, and other factors discussed below, render his 110 years to life sentence grossly disproportionate to his crimes. Accordingly, our state Constitution provides an additional basis for this Court to reverse the judgment and remand the case to the trial court for resentencing.

The juvenile system professionals who worked with Rodrigo Caballero as the case made its way through the system recognized the severity of the offense, but did not regard him as irredeemable or in need of lengthy confinement. The Probation Officer's Report for Judicial Review for a September 5, 2008 hearing noted Rodrigo's placement at the Dorothy Kirby Center, a mental health facility. (JR[1] 76.) The report noted his excellent adjustment to the program, daily school attendance with good grades, good response to staff instructions, good attitude, and absence of involvement in negative incidents. (JR 77.) The report detailed Rodrigo's

[1] References are made to the Clerk's Transcript ("CT"), the Reporter's Transcript ("RT") and to the augmented record filed in the Court of Appeal; for consistency with appellant's brief, *Amici* will use the term "JR" to refer to the augmented record. *Amici* were unable to obtain the portion of the augmented record with Dr. Simpson's report, but it was extensively referenced in the Court of Appeal opinion and by all the parties in briefing in this Court. References to that report will simply name the report and refer to specific pages within it.

extensive individual, group and family therapy. (JR 79.) The probation officer stated that if Rodrigo continued to participate in the program and make significant progress toward his treatment goals, "it is expected that he will be released after the next JDRV hearing in approximately six months." (JR 81.) The report indicated that the most likely date by which the minor will return to his home is March 5, 2009. (JR 82.) The probation officer's opinion -- that Rodrigo was capable of succeeding in his treatment program and that he should return home -- was written some 15 months after Rodrigo's arrest, just prior to the finding of unfitness and remand of the case to criminal court. The imposition of a 110 year to life sentence on this schizophrenic teenager is shocking to the conscience and in need of this court's attention.

B. California's State Proportionality Test under *Lynch* and *Dillon*

More than 40 years ago this Court held: "We conclude that in California a punishment may violate article I, section 6, of the Constitution if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."[2] (*In re Lynch* (1972) 8 Cal.3d 410,

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[2] When *Lynch* was decided in 1972, California's cruel-or-unusual-punishment ban was contained in article 1, section 6 of the Constitution. That version of section 6 was repealed November 5, 1974. (West's Ann. Cal. Const., art. I, § 6, Hist. Notes.) Since 1974, the provision has been

424.) On this basis, *Lynch* struck down a life sentence for a second-offense indecent exposure conviction as violating the California Constitution's prohibition against cruel or unusual punishment. In doing so, the Court articulated three factors or "techniques" that may be considered when evaluating a proportionality claim: (1) the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" (*id.,* at p. 425); (2) a comparison of the challenged punishment with punishments prescribed for more serious offenses in the same jurisdiction (*id.*, at p. 426); and (3) a comparison of the challenged punishment with punishments prescribed for the same offense in other jurisdictions.[3] (*Id.*, at p. 427). Considering the first factor, the Court concluded that the punishment in *Lynch* not only failed to fit the crime, "it does not fit the criminal." (*Id.*, at p. 437.)

Approximately a decade later, the Court examined the case of a 17-year-old who, while attempting to steal marijuana from a grow in the Santa Cruz Mountains, shot the grower nine times and was subsequently convicted of first degree felony murder and sentenced to life in state prison.

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contained in section 17, which reads "[c]ruel or unusual punishment may not be inflicted or excessive fines imposed." (Cal. Const., art. I, § 17.)

[3] The techniques enumerated in *Lynch* serve as examples of the ways a court may approach a proportionality problem; however, a punishment need not be disproportionate under all three tests in order to be found constitutionally excessive. (*People v. Dillon* (1983) 34 Cal.3d 441, 488, n. 38.)

(*People v. Dillon* (1983) 34 Cal.3rd 441.) The Court considered solely the nature of the offense and offender in its proportionality analysis, a branch of inquiry which "focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Id.*, at p. 479.) *Dillon* held that the first degree murder life sentence was disproportionate to the youth's individual culpability, and therefore constituted cruel and unusual punishment.

> At the time of the events herein defendant was an unusually immature youth. He had had no prior trouble with the law, and [...] was not the prototype of a hardened criminal who poses a grave threat to society. The shooting in this case was a response to a suddenly developing situation that defendant perceived as putting his life in immediate danger. To be sure, he largely brought the situation on himself, and with hindsight his response might appear unreasonable; but there is ample evidence that because of his immaturity he neither foresaw the risk he was creating nor was able to extricate himself without panicking when that risk seemed to eventuate.

(*Id.* at p. 487.) The Court modified the conviction to second degree murder. (*Id.* at p. 489.)

This Court's approach in *Dillon* was highly prescient, in that it anticipated *Graham*'s focus, almost 30 years later, on the transitory nature of youth which justifies a categorical rule barring life without parole sentences for juveniles convicted of non-homicide offenses, to ensure that

youth would not receive a sentence that classifies them as "irredeemably depraved." (*Graham*, 130 S.Ct. at pp. 2031-2032.)

Graham is rooted in the Court's analysis five years earlier in *Roper v. Simmons* (2005) 543 U.S. 551, which held the death penalty to be unconstitutional as applied to juveniles. Both *Roper* and *Graham* identify three characteristics that distinguish children from adults for purposes of culpability: adolescents lack responsibility and maturity, they are susceptible to peer pressure, and their characters are unformed. (*Graham*, 130 S.Ct. at p. 2026, *quoting Roper*, 543 U.S. at pp. 569-570). Further, *Graham* reflected the consistent historical position of the Supreme Court that children are developmentally different from adults. (*See, e.g. Haley v. Ohio* (1948) 332 U.S. 596, 599 ("That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces"); *Gallegos v. Colorado* (1962) 370 U.S. 49, 54 (a teen "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions…"); *see also In re Gault* (1967) 387 U.S. 1, 15-16).

The Supreme Court recognized in both *Graham* and *Roper* that a youth "is not absolved of responsibility for his actions," but that his or her culpability is reduced, and therefore an irrevocable penalty is developmentally inappropriate. (*Graham*, 130 S.Ct. at pp. 2026, 2032,

citing Roper, 543 U.S. at p. 573). The Eighth Amendment "forbid[s] States from making the judgment at the outset that those [juvenile nonhomicide] offenders never will be fit to reenter society." (*Graham, supra,* 130 S.Ct. at p. 2030.) Both *Graham* and *Roper* noted that an adolescent offender's reduced culpability was relevant even for crimes exhibiting extreme brutality. (*Id.* at p. 2032, *citing Roper*, 543 U.S. at 573).

Dillon's foresight in recognizing immaturity as significant to California's proportionality analysis finds ample support in *Graham*'s reliance upon an emerging body of research in psychology and brain science that "show fundamental differences between juvenile and adult minds." (*Graham, supra,* 130 S.Ct. at pp. 2026-2027; *see also J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2403, n. 5 ("although citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions [that children are different], the literature confirms what experience bears out").) Research reveals that adolescence has a transitory nature, "marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal relationships" and is "a period of development distinct from either childhood or adulthood with unique and characteristic features." (Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31-32 (2008)).

Youthful criminal behavior is rooted in these differences in the adolescent brain. Brain imaging shows that the areas of the brain

associated with impulse control, judgment, evaluation of risk and reward, and emotional regulation continue to develop through adolescence and into early adulthood. (Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty* (2003) 58 Am. Psych. 1009, 1011.) Adolescents are much more vulnerable to outside influences and pressure. (Jessica Owen-Kostelnik, et. Al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality* (May-June 2006) 61 Am. Psych. 286, 291).

Because their brains are still developing, adolescents who engage in criminal behavior do not automatically grow up to be adult criminals, and in fact, the typical delinquent youth does *not* grow up to be an adult criminal. (Steinberg & Scott, *supra*, 58 Am. Psych. at 1011; *see also* Scott & Steinberg, *supra, Rethinking Juvenile Justice* at 54; Richard A. Mendel, *Less Hype, More Help: Reducing Juvenile Crime, What Works – and What Doesn't* 15 (2000).). In effect, most adolescents – even those adjudicated for committing crimes – grow up and mature, and are capable of changing their lives to become productive citizens. As *Graham* recognized and held, the reduced culpability of adolescents due to their still-developing brains and reasoning skills makes the sentence of juvenile life without parole for nonhomicide offenders unconstitutional.

apply to juvenile offenders.'" (*Mendez*, at p. 65, quoting *Graham, supra,* at p. 2040.)

The youth in *J.I.A.* was convicted of two counts of sodomy by force, two counts of kidnapping to commit robbery, two counts of dissuading a witness by force, two counts of second degree robbery, kidnapping to commit a sexual offense, forcible oral copulation, and attempted second degree robbery, and numerous enhancements were found true. He received a sentence of 50 years to life plus two consecutive life terms for these offenses, which he committed when he was 14. (*People v. J.I.A., supra,* 127 Cal.Rptr.3d at p. 145.)

Considering the nature of the youth's offenses, the *J.I.A.* court did not mince words when it found them "particularly heinous," observing "[w]ith each of the victims, J.A., armed with a weapon, either sodomized, kidnapped, or robbed four vulnerable boys over the course of five weeks." (*J.I.A, supra,* at p. 151.)

However, *J.I.A.*, as in *Mendez,* determined J.A.'s age, 14 years old, to be highly relevant to a *Lynch/Dillon* analysis. *J.I.A.* also found J.A.'s family life and upbringing "also highly relevant" to the analysis. (*J.I.A., supra,* 127 Cal.Rptr.3d at p. 152.)

The court observed that when he was six years old, J.A. was forced to orally copulate an adult male; that there was evidence his father and his

stepfather, who both had substance abuse problems, emotionally and physically abused J.A., and that his mother neglected him:

> Clearly, J.A. had no positive influences in his life, and it is not surprising J.A. began drinking and smoking marijuana when he was 12 or 13 years old. He began having sex when he was 13 years old. Moreover, there was evidence J.A. was in "the mentally deficient range," and he was identified for special education courses as early as eight years old. It is certainly reasonable to conclude that J.A. had no parental guidance, and he was free to behave as he wished without fear of consequence. It is no wonder J.A. became involved in more serious criminal behavior.

(*J.I.A. supra,* 127 Cal.Rptr.3d at p. 152.)

J.I.A. held: "Based on J.A.'s age at the time of the offenses, his deficient upbringing, and his inferior intelligence, we conclude *Lynch*'s first factor alone, the nature of the offender, requires us to conclude J.A.'s sentence is cruel and unusual punishment under the federal and California proportionality tests." (*J.I.A.,* at p. 152.)

As the *Mendez* court stated, "we are mindful of the fact that successful challenges to sentences on the grounds of cruel and unusual punishment are rare." (*People v. Mendez, supra,* 188 Cal.App.4th at p. 68.) However, as discussed below, the characteristics of Rodrigo Caballero make this such a rare case.[5]

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[5] It is not only Rodrigo's personal characteristics that render this a rare case. Amici have had an opportunity to review the trial record, and are astounded at the extraordinary degree to which attorney incompetence infected the proceedings in the trial court. A not-comprehensive sampling:

D. The Nature Of The Offender: Rodrigo Caballero

1. Age and Immaturity

The court in this case sentenced Rodrigo Caballero to three consecutive life terms totaling 110 years to life for three counts of attempted murder, with enhancements. He was only 16 years old at the time of the offenses, and had no criminal history. (CT 79.) Here, as in *Mendez* and *J.I.A.*, following *Graham*, Rodrigo's age and immaturity at the

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Trial counsel did not raise competence, despite the client's recent, past findings of incompetency and the client's manifest problems in assisting in the defense and understanding court proceedings;

Did not object to the judge in the case although the judge served as a prosecutor in one of the cases used as a gang crime predicate;

Did not object to the seating of a juror who might have had the client as a student, and who said she had known lots of "gang bangers";

Did not demand proof of the officer's gang expertise and ability to render expert opinions;

Did not object to, move to strike, or seek to limit highly prejudicial, irrelevant, speculative, and hearsay-based gang evidence;

Did not challenge use of remote prior gang cases as the predicate for gang enhancements in this case;

Did not challenge identifications of the client as the shooter even when a witness admitted identifying him only after hearing from someone else that the client was the shooter;

Did not take a recess to talk with his client when his recently incompetent, mentally ill client unexpectedly decided to testify;

Did not prepare the client to take the stand;

Elicited the most damaging testimony in the case (admission to the shooting, and intent to kill) in his own direct examination of the client; and

Did not argue inconsistencies in the record regarding both eyewitness testimony and intent evidence.

time he committed his offenses is highly relevant to a proportionality analysis. (*Mendez*, at p. 65, *J.I.A.*, at p. 408, *Graham*, at p. 2026.)

One of the personal characteristics deserving of consideration in relation to age and immaturity is Rodrigo's gang membership. The investigating officer testified that Rodrigo had joined the gang only six months earlier (RT 1010), and that his actions on the day of the offense represented what is expected of gang members. (RT 1228). An extensive body of research has established that, for most youth, gang membership is transitory. The National Youth Gang Center reports that most youth leave the gang in less than a year. (National Youth Gang Center, *Frequently Asked Questions About Gangs*, Question 16, available at www.nationalgangcenter.gov/About/FAQ [as of October 24, 2011].) Significantly, too, gang involvement is very much a function of adolescence. Gang membership peaks at ages 15 to 17 years and then drops sharply; only a tiny percentage of gang members is 24 or older. (Howell, Egley and Gleason, *Modern-Day Youth Gangs* (2002), U.S. Department of Justice, Office of Justice Programs Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, p. 3; available at www.ncjrs.gov/pdffiles1/ojjdp/191524.pdf [as of October 24, 2011].)

Beyond the demographics, gang involvement is very much intertwined with the development of a self-identity for many adolescent Latino youth in Southern California. For youth who come from low

income, stress-ridden families and who are alienated from public institutions such as schools, the gang provides an alternative coping strategy, "mixing the normal peer-cohort friendship and emotional support activities with the more renowned street gang antisocial activities." (Vigil, *Barrio Gangs: Street Life and Identity in Southern California* (1988), p. 150.) Those youth with "the most fragmented egos" are especially attracted to the gang as a source of self-identity. (*Id.,* at p. 151.) The gang operates to give young males a role in society at the adolescent transition period when the peer group dominates socialization and largely replaces family and authority influences. Role modeling "becomes their raison d'etre," and gang members are primarily concerned with how they appear in the eyes of others. (*Ibid.*)

Rodrigo's gang involvement fits squarely with this description of the psychology of adolescent gang involvement. As a 16-year-old Latino suffering from Schizophrenia, he wanted to be perceived as tough and courageous, as evidenced by the preposterous bravado of his trial testimony. Through Rodrigo's immature and deluded eyes, the events of June 6, 2007 were about one thing: "I saved my hood." (RT 1230.) In *Graham*, the Supreme Court took note of just this sort of adolescent delusional perception in the context of Graham's in-court statements that he wanted a second chance so he could do whatever it takes to get into the NFL. (*Graham v. Florida, supra,* 130 S.Ct. at p. 2040.)

As was the case in *Graham*, the fact that Rodrigo was driven by misguided beliefs about honor and loyalty did not justify his acts. But, as in *Graham*, "his lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing...all suggest that he was markedly less culpable than a typical adult who commits the same offenses." (*Graham v. Florida, supra*, 130 S.Ct. at p. 2040.)

2. Mental Illness and Incompetence

Courts routinely consider the presence of mental disorders when analyzing the characteristics of the offender to determine whether a sentence is proportionate. (*See People v. Dillon*, supra, 34 Cal. 3d at p. 488 (reducing the defendant's charge from first-degree to second-degree murder based on immaturity, including fanciful thinking); *Graham v. Florida, supra,* 130 S.Ct. at p. 2018 (considering the defendant's diagnosed attention deficit hyperactivity disorder and drug and alcohol use as mitigating his culpability).)

In this case, Rodrigo's already-diminished culpability due to age and immaturity was compounded by serious mental illness. Three mental health experts found that he was psychotic and suffered from Schizophrenia (JR 16, 56, Slip Opn. 3-4), with the first opinion being rendered a few short months after his arrest. He was involuntarily hospitalized during the juvenile court proceedings, and was subsequently found incompetent to stand trial. The particular characteristics of his mental illness provide

compelling evidence that his behavior in the June 6, 2007 shooting was at least partially the product of his disordered thinking.

Dr. Raymond E. Anderson, a psychologist, examined Rodrigo in September 2007 for the purpose of evaluating his competence to stand trial. (Report from Dr. Raymond E. Anderson, Ph.D., to Denise McLaughlin-Bennett, hereafter "Anderson Report" (September 28, 2007), JR 15-20.) He observed that Rodrigo had social perception, cognitive processing, and social skills deficits as a younger child, and that more recently, "he developed a severely disabling form of Schizophrenia and has been able to function only marginally ever since." (JR 15-16.) Dr. Anderson described Rodrigo's inappropriate behavior, including his inclination "to call out to strangers or passers by to confirm a (frequently delusional) statement he has just made," or to "loudly confront anyone with who he disagrees, challenging their motives and understanding." (JR 16.) Dr. Anderson explained that Rodrigo's "delusional system features an assumption that nearly everyone has hostile intentions against him and is seeking a way to harm or exploit him." (*Ibid.*) Viewed against this clinical evaluation, Rodrigo's brash behavior at the time of the June 6th incident takes on a different cast.

Dr. Anderson diagnosed Rodrigo as suffering from Schizophrenia, Paranoid Type (Diagnostic and Statistical Manual IV 295.30.) (JR 17.) He noted that Rodrigo did not want to admit to having auditory hallucinations,

but that when he "is challenged about his (rather absurd) assumptions, he does say that "a little birdie" told him; that is why he is absolutely convinced beyond a shadow of a doubt that someone is lying or attempting to harm him." (*Ibid.*) These delusional beliefs led Rodrigo to be absolutely certain that his attorney was working against him. Dr. Anderson noted that Rodrigo probably has distorted beliefs about the exact nature of relationships he has with other people, as well, but that it is difficult to be more specific because Rodrigo has difficulty describing them. (JR 19.)

Dr. Anderson also provided a personal and family context for Rodrigo's mental illness. Rodrigo lived in a two-parent family where both parents worked, and he had two younger brothers. He attended a charter high school on a flexible program and worked on the weekends cleaning neighbors' yards, doing gardening or minor repair work. (JR 18.) Thus, his behavior appears related to his mental illness and not to an abusive family or life history.

In February 2008, several months after Dr. Anderson's evaluation, Dr. Haig J. Kojian evaluated Rodrigo for competence to waive his fitness hearing. (Report of Haig J. Kojian – Psychological Assessment of Competence, hereafter "Kojian Report (February 18, 2008), JR 52-59.) The fitness hearing is the proceeding in which the juvenile court decides whether or not a juvenile is "fit" for treatment in the juvenile system. (Welf. & Inst. Code, § 707.) Dr. Kojian noted that Rodrigo "was laughing

inappropriately and looking around the room at times as if he was responding to internal stimuli." (JR 53.) The Report notes that Rodrigo was involuntarily admitted to Olive View psychiatric hospital in November 2007 in connection with a threat to commit suicide and bizarre behavior while he was in juvenile hall. (JR 55.) At Olive View, he was considered to be disorganized in his thought process, with poor insight and judgment. (*Ibid.*) His lawyer complained to Dr. Kojian that it was difficult to communicate with Rodrigo about the facts of the case and the implications of waiving a fitness hearing, and that Rodrigo had accused court personnel of "trying to mess with his head." She told Dr. Kojian that Rodrigo has to be restrained coming in and out of court, and once was removed because of outbursts, and that he was openly masturbating while in lockup. (*Ibid.*) Rodrigo told Dr. Kojian he thought misdemeanors are more serious than felonies, and became angry with Dr. Kojian for asking him about such things. (*Ibid.*) He believed the charges against him "were erroneous and deliberately fabricated against him." (JR 57.)

Rodrigo was angry at still being in custody because he thought he had already won his fitness hearing and could have been home already. (JR 57.) Rodrigo did not understand the difference between juvenile and adult adjudication of the case, and thought that the faster the case was adjudicated, the faster he could go home. (JR 58.) Dr. Kojian concluded that Rodrigo was incompetent to waive his fitness hearing because he did

not appreciate the consequences of adult court handling, and also continued to believe that the fitness hearing was a trivial matter. (JR 59.)

Dr. Joseph Simpson, a psychiatrist, evaluated Rodrigo in July 2008. (Report of Dr. Joseph Simpson to Hon. Christopher Estes, hereafter "Simpson Report" (July 18, 2008).) At that time, Rodrigo was being held at the Dorothy Kirby[6] Center after previously being found incompetent. Dr. Simpson confirmed the diagnosis of Schizophrenia. Rodrigo told Dr. Simpson that he used to talk to the walls and think that things talked, but that the hallucinations had stopped two weeks before this interview. (Simpson Report, at p. 2.) Rodrigo told Dr. Simpson about "previous psychotic symptoms including command hallucinations telling him to attack other juveniles in the facility, hearing 'girls' voices,' and believing that he could control people's movements." He believed that he could "broadcast" his thoughts to others, a symptom of Schizophrenia. (*Ibid.*) Rodrigo reported to Dr. Simpson that since taking Risperdal, he had not experienced these symptoms.

Dr. Simpson found him competent to stand trial, but noted that it was imperative that Rodrigo stay on his medication to ensure continued

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[6] The Dorothy Kirby Center is a treatment facility for emotionally disturbed youth operated by the Los Angeles County Probation Department. (Los Angeles Almanac, available at www.laalmanac.com/crime/cr39.htm [as of October 24, 2011].)

competence, and "to prevent him from becoming dangerous or gravely disabled due to a recurrence of psychosis." (Simpson report, at p. 3.)

Thus, beginning shortly after the June 6, 2007 incident, successive clinicians diagnosed severe mental illness and found Rodrigo incompetent to stand trial. The constitutional standard for competence requires that a person have sufficient ability to consult with his lawyer with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings against him. (*Dusky v. United States* (1960) 362 U.S. 162, 171.)[7] Incompetence requires a very high level of impairment, and the fact that Rodrigo was found incompetent is indicative of his functioning at a very low level. Furthermore, the character of his paranoid delusions – in which Rodrigo perceived everyone to be an enemy – is uncannily similar to his courtroom testimony about the events of June 6th.

Rodrigo's belief that his lawyers were acting against his best interests also made it difficult for his attorneys to advise him, and this resulted in imprudent decisions such as the last-minute decision to testify before the jury. (RT 1220-1221.) His testimony revealed a person with difficulty understanding what was going on. The colloquy about whether he would testify reflects this:

[7] This standard was recently codified for California Juvenile Court proceedings. (Welfare and Institutions Code § 709, enacted by Stats. 2010, c. 671 (A.B. 2212), § 1.)

The Court: Mr. Clark, have you had a chance to speak to your client about whether or not he wishes to testify or whether or not he wishes to remain silent?

Mr. Clark: I have, Your Honor. It's his election to remain silent.

The Court: Is that correct, Mr. Caballero?

The Defendant: Um, no.

The Court: You want to testify?

The Defendant: Yes.

The Court: All right. Let me explain a few things to you. Number one, you have a right to remain silent in this case. You can just sit there and not utter one word. I told you that yesterday. If you do remain silent, I will instruct the jury they are not to consider your silence in any way. On the other hand, you could waive and give up your right to remain silent and you could testify on your own behalf in this case. Which one would you like to do?

The Defendant: I want to do all of them.

The Court: Pardon me?

The Defendant: All of them.

The Court: What? You can't do all of them. Which one do you want to do?

The Defendant: Can you repeat what you said?

The Court: Do you want to remain silent and not testify, or do you want to testify? If you testify, that means that you are going to get up here like these other witnesses. You will be sworn to tell the truth. Your attorney will ask you questions. Mr. Sherwood [the prosecutor] will then cross-examine you. Do you want to do that or do you want to sit there and remain silent?

The Defendant: I want to go up there and testify.

The Court: All right. So you waive and give up your right to remain silent?

The Defendant: Yes.

The Court: Okay. Very good."

(RT 1220-1221.)

When Rodrigo then took the stand, his testimony revealed a person utterly unaware of the consequences of his words. His descriptions of his actions and the duties of gang members to search for enemies resembled a script for comic book heroes. It was also apparent from his testimony that Rodrigo did not grasp the significance of shooting versus intending to kill -- something that had serious consequences for him in the verdicts. His testimony revealed someone who truly did not grasp the significance of what he had done or what he was saying. This was entirely consistent with the kind of compulsion experienced by a person with paranoid delusions – in his own mind, it was clear he needed to vanquish his enemy, but that compulsion was hard to explain to the rest of the world.

Rodrigo's ongoing mental disabilities must be given weight in the proportionality analysis. His mental illness played a significant role in his misguided efforts to protect and promote respect for the Lancas gang. His mental illness also interfered with his ability to participate in his defense.

Because he did not trust his attorneys or anyone else in the system, he made exceedingly poor decisions at every point in the process.

Much less serious mental impairment has played a role in proportionality analyses in other cases. In *Dillon*, the defendant was 17 years old at the time of his crime. Like Rodrigo Caballero, "he took the stand in his own behalf and told the jury his side of the story," which began, as in this case, with "youthful bravado." (*People v. Dillon*, *supra*, 34 Cal. 3d at p. 482.) A clinical psychologist testified that Dillon was "immature in a number of ways: intellectually, he showed poor judgment and planning; socially, he functioned like a much younger child; emotionally, he reacted again, much like a younger child by denying the reality of stressful events and living rather in a world of make-believe." (*Id.* at p. 483 (internal quotation omitted).)

It is significant that juvenile system professionals who worked with Rodrigo as the case made its way through the system did not regard him as irredeemable.[8] The Probation Officer's Report for the July 24, 2007 fitness hearing opined that while Rodrigo was unfit for juvenile court

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[8] Rodrigo's criminal profile is quite similar to that of a majority of youth held only up to age 25 in the California Division of Juvenile Justice. As of 2009, 89% of youth committed there, were there for violent offenses. (Division of Juvenile Justice, Offiee of Research, *First Commitment Characteristics Calendar Year 2009*, available at www.cdcr.ca.gov/Reports_Research/docs/research/FIRST2009.pdf [as of October 24, 2011].)

handling in relation to four of the fitness criteria (relating to the characteristics of the offense and his delinquency history), on the criterion of Rodrigo's capacity to be rehabilitated within the jurisdictional time available to the juvenile court, Rodrigo was fit for juvenile court. (JR 70-71.) The jurisdictional time ends at age 25. (Welf. & Inst. Code, § 607.)

A year later, the Probation Officer's Report for Judicial Review for a September 5, 2008 hearing noted Rodrigo's placement at the Dorothy Kirby Center. (JR 76.) The report noted his excellent adjustment to the program, daily school attendance with good grades, good response to staff instructions, good attitude, and absence of involvement in negative incidents. (JR 77.) The report detailed Rodrigo's extensive individual, group and family therapy. (JR 79.) The case plan goal checked off was "Family Reunification.") (JR 77.) The probation officer stated specifically that Rodrigo would continue to benefit from therapeutic services offered in closed suitable placement, and the expectation was that he would "ultimately reunify with his parents after successfully completing the DKC [Dorothy Kirby Center] program." (JR 80, bracketed material added.) The probation officer stated that if Rodrigo continued to participate in the program and make significant progress toward his treatment goals, "it is expected that he will be released after the next JDRV hearing in approximately six months." (JR 81.) The probation officer's opinion that Rodrigo was capable of succeeding in his treatment program and that he

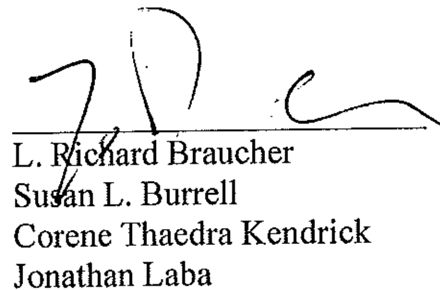
should return home -- written some 15 months after Rodrigo's arrest, just prior to the finding of unfitness and remand of the case to criminal court -- stands in stark contrast to the trial court's imposition of a 110 year sentence that classified him as "irredeemably depraved." (*Graham*, 130 S.Ct. at pp. 2031-2032.)

CONCLUSION

For all the foregoing reasons, Rodrigo Caballero's 110 years to life sentence "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch, supra,* 8 Cal.3d at p. 424.) His youth, immaturity, pervasive mental illness, probable incompetency, and lack of a prior criminal record render this a case where the sentence is unconstitutionally disproportionate to the crime. We urge the Court to find the de facto life without parole sentence to be a violation of article 1, section 17 of the California Constitution as well as a violation of the Eighth Amendment to the United States Constitution.

October 25, 2011

Respectfully Submitted,



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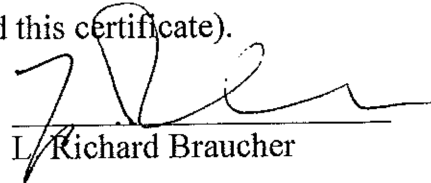
CERTIFICATE OF WORD COUNT

Counsel hereby certifies that this brief consists of approximately 5,634 words, according to the word count of the computer word-processing program (excluding tables, proof of service, and this certificate).

October 25, 2011



L. Richard Braucher

DECLARATION OF SERVICE BY MAIL

Re: People v. Rodrigo Caballero, S190647

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business address is 730 Harrison Street, Suite 201, San Francisco, CA 94107. On October 26, 2011 I have caused to be served a true copy of the attached **APPLICATION OF PACIFIC JUVENILE DEFENDER CENTER FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF ON BEHALF OF APPELLANT RODRIGO CABALLERO AND *AMICUS CURIAE* BRIEF** on each of the following, by placing same in an envelope(s) addressed as follows:

Kamala Harris
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Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in San Francisco, California, on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 26, 2011, at San Francisco, California.

Declarant