Instructions for the enclosed Pen. Code § 1203.01 motion template:

Enclosed is a Penal Code section 1203.01 motion template, which 18-25 year old LWOP offenders may use to request a *Franklin* hearing and to challenge the exclusion of 18-25 year old LWOP offenders from youth offender parole.

This motion was prepared in March, 2022. A case is pending in the California Supreme Court which may affect the equal protection aspect of this motion. (See *In re Woods* (2021) 62 Cal.App.5th 740, 752, review granted, June 16, 2021.) *Woods* addresses one-strike offenders, not LWOP, but it is possible that in *Woods,* the California Supreme Court may make some statements relevant to the equal protection claim in LWOP cases.

And, if a Court of Appeal accepts the equal protection claim, a trial court could choose to follow it. But for now, the trial courts are bound by the existing Court of Appeal cases that reject the equal protection claim.

If you wish to file this motion, you should fill in the information on pages 1, 2, 3, 21, and 24 as indicated in the attached sample pages. Do not file the sample pages.

The motion should be filed in the superior court (trial court) in the county in which you were convicted and sentenced.

You must serve a copy of this motion on the District Attorney.

Your motion is likely to be denied. If it is, you should file a notice of appeal in the trial court within 60 days. A copy of a notice of appeal form is included with this packet.

After you file the notice of appeal, counsel should be appointed to represent you in the Court of Appeal.

Name: _____

Address: _____

_____

_____

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF _____

People of the State of California, *Plaintiff*, v. _____, *Defendant.*	Superior Court No. _____

Motion for a *Franklin/Cook* proceeding under Penal Code section 1203.01 and for appointment of counsel

_____ respectfully files this motion seeking an evidence preservation proceeding under *People v. Franklin* (2016) 63 Cal.4th 261, and *In re Cook* (2019) 7 Cal.5th 439, at which s/he will be permitted to make a record of mitigating evidence tied to her/his youth. (See also *People v. Perez* (2016) 3 Cal.App.5th 612.) S/he further requests appointment of counsel to effectuate her/his rights at this proceeding. (See *Penson v. Ohio* (1988) 488 U.S. 75, 84; *People v. Hackett* (1995) 36 Cal.App.4th 1297, 1307-1308; U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15.)

Background

On _____, 20_ , _____ was charged with: _____, _____, _____ and with the following enhancements/special circumstances: _____ _____. On _____, 20__, _____ was found guilty of _____ and the following allegations were found true: _____ _____. On _____, 20__, _____ was sentenced to life without the possibility of parole (LWOP).

_____ now files this motion seeking a *Franklin/Cook* proceeding under Penal Code section 1203.01, and the appointment of counsel to represent him/her at the proceeding.

_____ acknowledges that this court is bound by Court of Appeal authority holding that the exclusion of 18- to 25-year-olds sentenced to LWOP from youth offender parole does not violate equal protection. (See, e.g., *People v. Jackson* (2021) 279 Cal.Rptr.3d 396, 401-404.) Nonetheless, to preserve this claim for further review, s/he files this section 1203.01 motion contending that the exclusion of 18- to 25-year-olds from youth offender parole violates his/her constitutional rights to equal protection (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.)

_____ further contends that the exclusion of 18- to 25-year-olds from youth offender parole, and the failure to provide any mechanism for parole in his/her case, violates the state constitutional ban on cruel or unusual punishment. (Cal. Const., art. I, § 17.)

_____ is entitled to an evidence preservation proceeding under *Franklin, Cook,* equal protection principles, and the state constitutional ban on cruel or unusual punishment.

Offenders who, after final judgment, seek to preserve evidence for a youth offender parole hearing may file a Penal Code section 1203.01 motion, under the original caption and number, in superior court, citing *Cook, supra,* 7 Cal.5th 439. The motion should establish entitlement to a youth offender parole hearing and indicate when it is expected to occur. (*Id.* at p. 458.) An equal protection challenge to the exclusion of 18- to 25-year-old LWOP offenders from youth offender parole may be raised in the motion. (*People v. Sands* (2021) 70 Cal.App.5th 193, 200-202.) Likewise, movant's cruel or unusual punishment claim may be raised in the motion.

_____ was ____ years old at the time of the crime(s) of conviction. (See _____.) Based on equal protection and cruel or unusual punishment principles, set forth in the attached memorandum, s/he is entitled to a youth offender parole hearing under Penal Code section 3051 after 25 years in state prison. _____ has been in custody since _____ and will have served 25 years in _____, 20__. (See _____.)

_____ requests that upon the filing of this motion, this Court appoint counsel to represent her/him. (See *Penson, supra,* 488 U.S. at p. 84; *Hackett, supra,* 36 Cal.App.4th at pp. 1307-1308; U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15.)

Dated: _____, 20___ Respectfully submitted,

_____

Memorandum of Points and Authorities

I. THE EXCLUSION OF EIGHTEEN- TO TWENTY-FIVE-YEAR-OLDS SENTENCED TO LIFE WITHOUT PAROLE FROM YOUTH OFFENDER PAROLE CONSIDERATION VIOLATES EQUAL PROTECTION.

A. Equal protection is violated when similarly situated groups are treated differently without a rational basis.

The Fourteenth Amendment's equal protection clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike. [Citation.]" (*City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 439.) Likewise, Article I, section 7 of the California Constitution guarantees equal protection. (See *People v. Edwards* (2019) 34 Cal.App.5th 183, 195.)

In assessing an equal protection claim, the first question is whether "the state has adopted a classification that affects two or more *similarly situated* groups" unequally. (*People v. Brown* (2012) 54 Cal.4th 314, 328 [citation and internal quotation marks omitted].) "This initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (*Ibid.* [citation and internal quotation marks omitted].) The second question is whether there is a "rational relationship between the disparity of treatment and a legitimate governmental purpose" (*Edwards, supra*, 34 Cal.App.5th at p. 197), i.e., whether the classification "rationally advances a reasonable and identifiable governmental objective ... ." (*Schweiker v. Wilson* (1981) 450 U.S. 221, 235.) Courts addressing equal protection claims must "conduct *a serious and genuine judicial inquiry* into the correspondence between the classification and the legislative goals." (*Fein v. Permanente Med. Grp.* (1985) 38 Cal.3d 137, 163 [citations and internal quotation marks omitted].)

Again, movant recognizes that this court is bound to follow Court of Appeal precedent holding that the exclusion of 18- to 25-year old LWOP offenders from youth offender parole does not violate equal protection. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Nonetheless, s/he presents the argument below for purposes of further review.

B. There is no rational basis for denying youth offender parole hearings to 18- to 25-year-olds sentenced to LWOP when similarly situated groups are entitled to such hearings.

1. LWOP offenders aged 18 to 25 are similarly situated to de facto LWOP offenders aged 18 to 25; no rational basis supports granting the possibility of youth offender parole to the latter but not the former.

Eighteen- to 25-year-olds sentenced to LWOP and 18- to 25-year-olds sentenced to de facto LWOP have effectively the same sentence. They are similarly situated for purposes of section 3051 – and for purposes of any of the recognized rationales for punishment.

The purpose of section 3051 is to determine whether young people sentenced to life in prison "'have outgrown the youthful impulses that led to the commission of their offenses.'" (*People v. Acosta* (2021) 60 Cal.App.5th 769, 779, quoting *In re Jones* (2019) 42 Cal.App.5th 477, 486 (conc. opn of Pollak, J.).) Eighteen- to 25-year-olds sentenced to LWOP are similarly situated to 18- to 25-year-olds sentenced to de facto LWOP. (See *Acosta, supra,* 60 Cal.App.5th at p. 779; *Jackson, supra,* 279 Cal.Rptr.3d at pp. 405-406 (conc. opn. of Dato, J.); but see, e.g., *In re Williams* (2020) 57 Cal.App.5th 427, 435.)

In determining whether there is a rational basis for the distinction the Legislature has drawn, the purpose of the statute remains critical. (*People v. Morales* (2021) 67 Cal.App.5th 326, 351-352 (conc. & dis. opn. of Pollak, P.J.); *Fein, supra,* 38 Cal.3d at p. 163; *Romer v. Evans*

(1996) 517 U.S. 620, 632 [in applying rational basis review, the Court "insist[s] on knowing the relation between the classification adopted and the object to be attained"].)

As Justice Liu has explained, section 3051's parole eligibility scheme is in tension with equal protection principles because it excludes certain people depending on the crime of conviction, when the "mitigating attributes of youth are not 'crime-specific.'" (*Jackson, supra,* 279 Cal.Rptr.3d at pp. 406-407 (conc. statement of Liu, J., on denial of review).)[1]

But even if "crime-specific" distinctions could be drawn, the distinction the Legislature has drawn does not withstand equal protection scrutiny. Courts that have concluded that the two groups are not similarly situated, or may rationally be treated differently, have mis-defined the comparison group, and have concluded based on this mis-definition that those sentenced to LWOP are more culpable than those sentenced to non-LWOP sentences.

For the purpose of this analysis, the group similarly situated to LWOP offenders aged 18 to 25 is not the entire group of people with sentences less than LWOP, or even the entire group of people sentenced to parole-eligible life-top sentences. Nor is it, as *Jackson* posits, "youthful offenders convicted of first degree murder." (*Jackson, supra,* 279 Cal.Rptr.3d at p. 403; see *Williams, supra,* 57 Cal.App.5th at 435-436 [comparing special circumstances murder with nonspecial circumstances murder and LWOP to parole-eligible life terms generally].)

Jackson reasons that "youthful offenders who have been sentenced to LWOP have committed an aggravated form of first degree murder that distinguishes them from youthful

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[1] More generally, "[t]he mere fact that certain defendants were convicted of different crimes" cannot resolve the "similarly situated" question. (*Jackson, supra,* 279 Cal.Rptr.3d at p. 405 (conc. opn. of Dato, J.).) "'[S]imilar' does not mean 'identical.'" (*Ibid.*)

offenders who have committed first degree murder but done so in the absence of any such aggravating factors." (*Jackson, supra,* 279 Cal.Rptr.3d at p. 404.) But those convicted of first-degree murder alone do not get a benefit from the youth offender parole law. Eighteen- to 25-year-olds convicted of first-degree murder in the absence of enhancements or other consecutively-sentenced crimes are eligible for parole after 25 years with or without Penal Code section 3051. It is primarily those who have been sentenced to lengthy life terms such as 50 to life, 75 to life, or even 300 to life, who get the benefit of youth offender parole. This group does not consist of people convicted of first-degree murder without any aggravating circumstances. Rather, it consists, largely, of people convicted of first-degree murder with enhancements and/or consecutive sentences for other crimes.

When the comparison is made to the appropriate group – the group that benefits from section 3051, i.e., 18- to 25-year-olds sentenced to de facto LWOP – it is clear the two groups are similarly situated, and there is no rational basis for treating them differently. There is no significant difference between LWOP and de facto LWOP. (See, e.g., *People v. Caballero* (2012) 55 Cal.4th 262, 268-269; *Franklin, supra,* 63 Cal.4th at pp. 275-276; *Moore v. Biter* (9th Cir. 2013) 725 F.3d 1184, 1187, 1191 ["no constitutionally significant" distinction between LWOP and 254 years]; *People v. Lewis* (2013) 222 Cal.App.4th 108, 119.)

Contrary to the court's statement in *Williams,* the Legislature has *not* "prescribed an LWOP sentence for only a small number" of the most "morally depraved" and "injurious" crimes. (*Williams, supra,* 57 Cal.App.5th at p. 436.) Rather, as this Court has recognized, LWOP applies to a "broad and diverse range" of first-degree murders. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1381.)

There are 21 special circumstances – one including twelve subsections – which, if found true, result in mandatory LWOP. (Pen. Code § 190.2(a);[2] Lynch, *Double Duty: The Amplified Role of Special Circumstances in California's Capital Punishment System* (2020) 51 Colum. Hum. Rts. L.Rev. 1008, 1015-1016 [special circumstances do not narrow pool of first-degree murders much, if at all].) A recent study found that under the statute in effect in 2008, 95% of first-degree murder convictions in California qualify for the death penalty (and therefore also for LWOP). (Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement* (2010) 66 U.C.L.A. L.Rev. 1394, 1397.)[3]

While the law identifies special circumstances permitting LWOP, it also, by providing for enhancements and consecutive sentencing, identifies circumstances permitting de facto LWOP. De facto LWOP sentences, like LWOP sentences, arise from a broad and diverse range of first-degree murders, with firearm enhancements and/or additional attempted murders or other crimes. (E.g. *People v. Sepulveda* (2020) 47 Cal.App.5th 291, 295, 297.)[4]

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[2] See *People v. Carrasco* (2014) 59 Cal.4th 924, 970 [heinous, atrocious, and cruel special circumstance is unconstitutional].

[3] The breadth of the special circumstances and the discretion afforded to prosecutors in deciding whether to charge such circumstances has led, at minimum, to inconsistency. (See *Morales, supra,* 67 Cal.App.5th at 354 (conc. & dis. opn. of Pollak, P.J.).) Worse, race and class bias may affect the determination whether to charge special circumstances. (See *ibid.*) Indeed, 79% of individuals serving LWOP in California are people of color. (Com. on Revision of Pen. Code, 2021 Annual Report [CRPC 2021 Annual Report], pp. 50-51 [available at http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf].)

[4] De facto LWOP may also be imposed for second-degree murders with enhancements and additional convictions, or for multiple serious non-homicide crimes. Likewise, a limited number of non-homicide crimes can result in LWOP. (See *Williams, supra,* 57 Cal.App.5th at p. 436, fn. 6.)

Both LWOP offenders and de facto LWOP offenders have received an enhanced sentence that does not allow for parole in their lifetime – and are equally culpable if it is assumed that sentencing rationally reflects culpability. (See *Caballero*, *supra*, 55 Cal.4th at p. 272 (conc. opn. of Werdegar, J.) ["[A] criminal sentence must be directly related to the personal culpability of the criminal offender[.] [Citation.] [T]his concern applies equally whether the sentence is one of life without parole or a term of years that cannot be served within the offender's lifetime."].)

With respect to deterrence, there is no distinction between LWOP and de facto LWOP. (See *Sumner v. Shuman* (1987) 483 U.S. 66, 83.)

With respect to incapacitation, likewise, there is no distinction between LWOP and de facto LWOP; neither allows a meaningful opportunity to obtain release. (See *Caballero*, *supra,* 55 Cal.4th at p. 268.) The judgment that a person will be incorrigible for 100 years is no different from the judgment that they will be incorrigible forever. (Cf. *People v. Contreras* (2018) 4 Cal.5th 349, 369.)

More, both groups are similarly situated for purposes of motivating rehabilitation – another purpose of youth offender parole hearings. (See *Williams, supra,* 57 Cal.App.5th at pp. 434-435; *Contreras, supra,* 4 Cal.5th at pp. 368-369.) Both groups are "more likely to enroll in school, drop out of a gang, or participate in positive programs if they can sit before a parole board sooner, if at all, and have a chance of being released." (*Williams, supra,* 57 Cal.App.5th at p. 435; cf. *In re Woods* (2021) 62 Cal.App.5th 740, 752, review granted, June 16, 2021.)

In sum, in light of the specific purpose of section 3051, and even in light of any of the recognized rationales for punishment, 18- to 25-year-olds sentenced to LWOP are similarly situated to those in the same age group who have been sentenced to de facto LWOP.

Constitutionally, and practically, they have the same sentence. There is no rational basis for treating them differently.

2. LWOP offenders aged 18 to 25 are similarly situated to LWOP offenders under 18; no rational basis supports granting youth offender parole hearings to the latter but not the former.

The purpose of Penal Code section 3051 was to align public policy with scientific research showing that the brain does not fully develop until the early to mid-20s (see *People v. Montelongo* (2020) 274 Cal.Rptr.3d 267, 286 (conc. opn. of Segal, J.) [quoting legislative history]) and to permit evaluation of whether, "over an extended period of incarceration, an individual who committed a serious crime while still youthful has been rehabilitated and can be released from custody without risk to the public." (*Morales, supra,* 67 Cal.App.5th at 352 (conc. & dis. opn. of Pollak, P.J.).)

Eighteen- to 25-year-olds sentenced to LWOP are similarly situated to people under 18 sentenced to LWOP for these purposes. (See *Acosta, supra,* 60 Cal.App.5th at pp. 778-779; *Jackson, supra,* 279 Cal.Rptr.3d at pp. 405-406 (conc. opn. of Dato, J.); but see *Williams, supra,* 57 Cal.App.5th at p. 435, fn. 5.) And given these purposes, there is no rational basis for treating the two groups differently.

In *Sands*, the Court of Appeal reasoned that the Legislature "could rationally decide to remedy unconstitutional sentences but go no further." (*Sands, supra,* 70 Cal.App.5th at p. 204 [citations omitted].) Examination of the entire youth offender parole scheme, however, makes clear that that was not the decision the Legislature made. The Eighth Amendment does not require any youth offender parole consideration for individuals over the age of 18, yet the Legislature, in light of scientific research on the youthful brain, has extended the scheme up to

the age of 26. (See *Montelongo, supra,* 274 Cal.Rptr.3d at p. 286 (conc. opn. of Segal, J.); *id.* at 288-289 (conc. statement of Liu, J., on denial of review).)

Given the United States Supreme Court's "clear statement that the mitigating attributes of youth are not 'crime-specific'"[5] and the Legislature's recognition that these attributes persist up to age 25, there is no rational basis for section 3051's exclusion of 18- to 25-year-olds sentenced to LWOP. (Cf. *Montelongo, supra,* 274 Cal.Rptr.3d at pp. 289-290 (conc. statement of Liu, J., on denial of review) [questioning rational basis for LWOP exclusion].)

II. THE EXCLUSION OF 18- TO 25-YEAR-OLD LWOP OFFENDERS FROM YOUTH OFFENDER PAROLE VIOLATES THE STATE CONSTITUTIONAL BAN ON CRUEL OR UNUSUAL PUNISHMENT.

Movant was sentenced to mandatory life in prison without the possibility of parole. All offenders sentenced to LWOP – regardless of age – are sentenced to die in prison. (See *Graham v. Florida* (2010) 560 U.S. 48, 69.) LWOP is "akin to the death penalty." (*Miller, supra,* 567 U.S. at pp. 474-475.)

But movant effectively received one of the longest, harshest LWOP sentences a person could receive, perversely, *because of* his/her youth. (Cf. *Miller, supra,* 567 U.S. at p. 475, quoting *Graham, supra,* 560 U.S. at p. 70 [juvenile LWOP offenders "will almost inevitably serve 'more years and a greater percentage of [their lives] in prison than an adult offender'"].)

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[5] *Montelongo, supra,* 274 Cal.Rptr.3d at pp. 289-290 (conc. statement of Liu, J., on denial of review); see *Miller v. Alabama* (2012) 567 U.S. 460, 473.

In recent years, state and federal courts have wrestled with reconciling the Supreme Court's clear command that "youth matters"[6] – and its rigid definition of youth as referring to individuals under 18 – with the scientific understanding that youth continues into an individual's twenties. While *Miller, supra,* 567 U.S. 460, held that a mandatory LWOP sentence for a juvenile is categorically cruel and unusual, California courts have held *Miller*'s concerns end at age 18.

These California decisions have been rooted not in state constitutional analysis or science, but in deference to the United States Supreme Court's interpretation of the Eighth Amendment. (See, e.g., *Montelongo, supra,* 274 Cal.Rptr.3d at pp. 279-280; *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482.)

Some justices have questioned this bright line. One recently observed that while "the changes in the legal and scientific landscape since the United States Supreme Court decided *Roper*[7] in 2005 suggest we should reconsider the propriety, wisdom, and perhaps even the constitutionality of imposing a mandatory sentence of life without the possibility of parole on an 18-year-old[,]" courts are "stuck with the line" drawn by the Supreme Court and the state Legislature. (*Montelongo, supra,* 274 Cal.Rptr.3d at p. 287 (Segal, J., concurring); see *U.S. v. Williston (10th Cir. 2017)* 862 F.3d 1023, 1040.)

As research now shows – and as the state Legislature recognizes – youth aged 18 to 25 share the physiological and psychological traits of individuals under 18. (See, e.g.,

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[6] *Miller, supra,* 567 U.S. at 473.

[7] *Roper v. Simmons* (2005) 543 U.S. 551, 571-575, banned the death penalty for juveniles.

Montelongo, supra, 274 Cal.Rptr.3d at 289 (conc. statement of Liu, J., on denial of review); *In re Murray* (2021) 68 Cal.App.5th 456, 460-462.) Eighteen- to 25-year-olds, like juveniles, are therefore less culpable and less deserving of the harshest punishments, including mandatory LWOP. It has accordingly become indefensible to exclude youthful offenders aged 18 to 25 from the benefit of an individualized sentencing that considers the mitigating qualities of youth, and this Court should so hold under the state constitution.[8]

Article I, section 17 of the California Constitution prohibits the infliction of "[c]ruel or unusual punishment." A sentence violates this prohibition if it is so disproportionate to the crime "that it shocks the conscience and offends fundamental notions of human dignity." (*People v. Dillon* (1983) 34 Cal.3d 441, 478.) The Eighth Amendment prohibits cruel *and* unusual punishment. (U.S. Const., 8th Amend.; *Caballero, supra,* 55 Cal.4th at p. 265, fn. 1.)

"The distinction in wording between the federal and state constitutions is substantive and not merely semantic." (*People v. Avila* (2020) 57 Cal.App.5th 1134, 1145, fn. 13.) While gross disproportionality may be the touchstone under both constitutions, courts must nonetheless construe the state provision separately from its federal counterpart. (*People v. Baker* (2018) 20 Cal.App.5th 711, 723; Cal. Const., art. I, § 24; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 355.)

Three techniques, first identified in *In re Lynch* (1972) 8 Cal.3d 410, 425-427, are employed to determine whether a particular sentence is disproportionate under the California Constitution: (1) appellant's background and the nature of the offense; (2) punishment in the

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[8] Regarding the Eighth Amendment, movant recognizes this court is bound by decisions of higher courts. (*Auto Equity, supra,* 57 Cal.2d at p. 455; *People v. Bradley* (1969) 1 Cal.3d 80, 86.)

same jurisdiction for more serious offenses; and (3) punishment for similar offenses in other jurisdictions. (*In re Nunez* (2009) 173 Cal.App.4th 709, 725.) Each "technique" can be sufficient by itself to demonstrate a particular sentence is unconstitutional. (E.g., *ibid.*; *Avila, supra*, 57 Cal.App.5th at p. 1150; *Dillon, supra,* 34 Cal.3d at pp. 479-489; *id.* at p. 487, fn. 38.)

The context in which these techniques are applied is not static; dating back to *Lynch*, contemporary standards of decency have been brought to bear. Addressing an indeterminate sentence of one year to life for indecent exposure, *Lynch* noted that at common law, and for 80 years after enactment of the 1872 Penal Code, indecent exposure was a misdemeanor. (*Lynch, supra*, 8 Cal.3d at p. 429.) The Court also noted proposed legislation to reclassify indecent exposure as a misdemeanor. (*Id.* at p. 437.) The life sentence for indecent exposure was thus, in historical context, an anomaly.

Similarly, in *People v. Anderson* (1972) 6 Cal.3d 628, later abrogated, the Court held that capital punishment was impermissibly cruel judged against "contemporary standards of decency." (*Id.* at pp. 650-651.) "The framers of our Constitution ... anticipated that interpretation of the cruel or unusual punishments clause would not be static but that the clause would be applied consistently with the standards of the age in which the questioned punishment was sought to be inflicted." (*Id.* at p. 648.)

And recently, the Court of Appeal noted that the "evolving state of California's criminal jurisprudence is relevant to an analysis of disproportionality and, hence, to what is cruel or unusual punishment under our state constitution." (*Avila, supra*, 57 Cal.App.5th at p. 1150.) *Avila* discussed significant changes to the Three Strikes law, additional changes to recidivist laws and firearms enhancements, and changes to the definitions of culpability for certain crimes as indicating a "sea change" in sentencing and suggestive of disproportionality in Avila's sentence.

(*Id.* at pp. 1150-1151.) *Avila* emphasized that what is common and routine is not necessarily constitutional, and that courts "must take a fresh look at old habits and the profound consequences they have in undermining our institutional credibility and public confidence." (*Id.* at pp. 1151-1152.)

While life sentences, including LWOP, may have become common in California, true LWOP – with no possibility of parole – may nonetheless, like the life sentence for indecent exposure in *Lynch*, be viewed as an historical anomaly. True LWOP was not common in California until the mid-1990s, when Board of Prison Terms reviews of LWOP sentences were discontinued. (See Com. on Revision of Pen. Code, First Supp. to Staff Memorandum 2021-06, Extreme Sentences and High Profile Enhancements [CRPC, Extreme Sentences], Panelist Materials, Exh. C, written submission of Prof. Christopher Seeds [available at: http://www.clrc.ca.gov/ CRPC/Pub/Memos/CRPC21-06.pdf].) The Committee on Revision of the Penal Code has now recommended the creation of a review process for life without parole sentences. (CRPC 2021 Annual Report, *supra,* p. 50.)

More, a sea change has occurred in recent years in sentencing for young offenders. Contemporary standards, and settled federal constitutional law, now hold that young people are developmentally different from adults and less deserving of the harshest punishments. (See, e.g., *Roper, supra,* 543 U.S. at pp. 569-574, 578; *Miller, supra,* 567 U.S. at pp. 465, 471; *Graham, supra,* 560 U.S. at pp. 52, 82.) The Supreme Court has relied on three developmental characteristics of youth under the age of 18 to establish their diminished culpability: (1) impulsivity and immaturity; (2) susceptibility to outside influences, and (3) capacity for change. (See *Montgomery v. Louisiana* (2016) 577 U.S. 190, 207.)

The California Legislature has taken steps to bring juvenile sentencing into conformity with *Graham*, *Miller,* and *Caballero.*[9] And, recognizing that science now establishes that areas of the brain affecting judgment and decision-making do not fully develop until young adulthood, the Legislature has gone beyond the requirements established by the courts interpreting the Eighth Amendment. (See *Montelongo*, *supra*, 274 Cal.Rptr.3d at pp. 286-287 (Segal, J., concurring).) The Legislature has amended section 3051 twice – first, in 2015, to extend youth offender parole to those under 23, and again, in 2017, to raise the age of eligibility to 25. (*Jones, supra,* 42 Cal.App.5th at pp. 484-485 (Pollak, J., concurring).)[10]

In addition to recognizing the evolving scientific evidence on brain development, the Legislature has also recently recognized that racial bias plays a role in who gets punished and for how long. The Racial Justice Act ("RJA") now prohibits prosecutors from seeking conviction or sentence on the basis of race, ethnicity, or national origin.[11] The Legislature declared its intent "to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing" and

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[9] *Caballero, supra,* 55 Cal.4th at p. 268, held that a 110-to-life sentence for a juvenile nonhomicide offender amounted to LWOP and violated the federal constitution.

[10] Other states have similarly extended *Miller*'s guidance to age 21 or 25. (See, e.g., D.C. Code § 24-403.03 [offenders under the age of 25 at the time of the crime may apply for early release after 15 years]; *Matter of Monschke* (Wash. 2021) 482 P.3d 276, 286-287; The Sentencing Project, Policy Brief: Juvenile Life Without Parole (May 24, 2021), p. 5 [available at https://www. sentencingproject.org/publications/juvenile-life-without-parole/] [in addition to D.C. and Washington State, legislation for individuals under 21 has progressed elsewhere]; see also *Nelson v. State* (Minn. 2020) 947 N.W.2d 31, 57 (Thissen, J., dissenting) ["*Miller*'s logic provides no explanation why [appellant who was seven days past his 18th birthday] should not be entitled to individualized consideration of his age while an offender who is 17 years and 364 days old is so entitled."].)

[11] The RJA applies prospectively to cases with trial court judgments on or after January 1, 2021. (Pen. Code § 745(j).)

"to reject the conclusion that racial disparities within our criminal justice are inevitable, and to actively work to eradicate them." (Stats. 2020, Ch. 317, § 2(i) (AB 2542).)

This legislative intent also bears on the application of evolving standards of decency to LWOP sentences, given the significant racial disparities. 79%-81% of individuals sentenced to LWOP are people of color; 70% are Black or Latinx. (CRPC 2021 Annual Report, *supra,* pp. 50-51.) The disparity is even more pronounced for those under 26 at the time of the offense: people of color are 86-87% of this group and Black and Latinx individuals are 76% of this group. (*Id.* at p. 51.)

By themselves, these legislative choices do not resolve the constitutional issues this Court must decide. (See *In re Palmer* (2021) 10 Cal.5th 959, 965.) But these developments, on both fronts – the reduced culpability of offenders under 26 and the impact of racial bias – are relevant to the question of disproportionality under our state constitution. (See *Avila, supra,* 57 Cal.App.5th at p. 1150.) Contemporary standards on youth and sentencing have changed, and a mandatory sentence of LWOP – a sentence to die in prison – for an 18- to 25-year-old offender is disproportionate and shocking to the conscience.

III. THE LWOP SENTENCE IMPOSED IN THIS CASE, WHICH DOES NOT ALLOW FOR RELEASE ON PAROLE, IS UNCONSTITUTIONAL.

Courts should account for the modern scientific and legislative understanding of extended adolescence when applying the *Lynch* techniques. Under the first technique, courts examine the nature of the offense and the offender's background, looking to the defendant's individual culpability, considering his or her age, personal characteristics, any prior criminality, and state of mind, and the degree of danger presented to society. (See *Nunez, supra,* 173 Cal.App.4th at pp. 725, 731; *Dillon, supra,* 34 Cal.3d at p. 479.) Courts also assess the totality of

the circumstances surrounding the offense and whether the punishment fits the offender. (See *Baker, supra,* 20 Cal.App.5th at p. 724.) These particular facts about movant's background and the offense establish a diminished level of culpability in several critical respects:

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Second, a court compares the punishment imposed with punishments prescribed in California for more serious offenses. (*Lynch, supra,* 8 Cal.3d at pp. 426-427.) "[I]f among them are found more serious crimes punished less severely than the offense in question, the challenged penalty is to that extent suspect." (*Id.* at p. 426.) A comparison nonetheless "remains instructive" when an offense is punished just as severely as a more serious crime. (*Dillon, supra,* 34 Cal.3d at p. 487, fn. 38.) Because some statutes proscribe a wide range of conduct, courts must consider the entire range of conduct covered by the statute and a determination of the seriousness of the crime must turn on the facts of the individual case. (See *People v. Wingo* (1975) 14 Cal.3d 169, 177-178.)

Movant's sentence places him/her in a group that should include the most culpable offenders, including those who have committed first-degree murders with special circumstances involving bombing, for example. (See Pen. Code § 190.2(a).) It is unlikely that movant, a young person at the time of the crime of conviction, belongs in the group of the most culpable offenders in the state.[12]

Finally, in assessing whether a sentence is unconstitutionally disproportionate, courts compare the sentence with punishments other jurisdictions prescribe for the same offense. While it may be difficult to establish that California, in comparison to other jurisdictions in the U.S., disproportionately sentences individuals convicted of movant's particular crime to LWOP, it is nonetheless clear that among nations, and across time, the routine use of LWOP, no matter the crime, is an anomaly. (See CPRC, 2021 Annual Report, *supra,* at pp. 50, 53, 55; The Sentencing Project, No End in Sight: America's Enduring Reliance on Life Imprisonment [available at https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/], pp. 5, 11, 15; cf. *Avila, supra,* 57 Cal.App.5th at pp. 1151-1152 [noting difficulty of interstate comparison, contextualizing lengthy sentences historically, and noting that "common is not synonymous with constitutional"].)

And in California, this extreme punishment is disproportionately imposed on youthful offenders. The majority of individuals sentenced to LWOP in California are, like movant, youthful offenders: Of the more than 5,000 people currently serving LWOP in California, 62 percent were under 26 at the time of their offense. (CRPC 2021 Annual Report,

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[12] In general, "special circumstances do not seem to be channeling the most culpable people to life without parole sentences." (CPRC, 2021 Annual Report, *supra,* at p. 52.)

supra, at pp. 50, 54.) When compared to the entire prison population, people serving life without parole sentences were youngest at the time of the offense. (*Id.* at p. 53.) And again, racial disparities are even more prevalent among individuals under 26 at the time of the offense. (*Id.* at p. 51) In other words, the people California punishes with this extreme sentence are disproportionately young people of color. (*Id.* at pp. 50-51, 53, 54.) Their youth, in turn, means that they serve longer, harsher LWOP sentences than their older counterparts. (See *Miller*, *supra,* 567 U.S. at p. 475, quoting *Graham, supra,* 560 U.S. at p. 70; see p. 13, above.)

Movant respectfully contends that the LWOP sentence imposed in this case is cruel or unusual, in violation of the state constitution.

CONCLUSION

The question presented is not whether movant, or any other 18- to 25-year-old LWOP offender, should be paroled. The question is whether, after 25 years, they should be given the opportunity, like de facto LWOP offenders aged 18 to 25, and LWOP offenders under 18, to demonstrate they have matured and would live a law-abiding life upon release. (See *Morales, supra,* 67 Cal.App.5th at pp. 354-355 (conc. & dis. opn of Pollak, P.J.).)

For all the reasons set forth above, the exclusion of 18- to 25-year-old LWOP offenders from youth offender parole hearings violates the federal and state constitutional rights to equal protection and the state constitutional ban on cruel or unusual punishment.

Dated: _____, ____ Respectfully submitted,

_____

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: (___)-___-____ FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
PEOPLE OF THE STATE OF CALIFORNIA **VS.** Defendant: Date of birth: _____ Cal. Dept. of Corrections and Rehabilitation No. (if any): _____	
NOTICE OF APPEAL—FELONY (DEFENDANT) **(Pen. Code, §§ 1237, 1237.5, 1538.5(m); Cal. Rules of Court, rule 8.304)**	CASE NUMBER:

NOTICE

- **You must file this form in the SUPERIOR COURT WITHIN 60 DAYS after the court rendered the judgment or made the order you are appealing.**
- **IMPORTANT:** If your appeal challenges the validity of a guilty plea, a no-contest plea, or an admission of a probation violation, you must also complete the Request for Certificate of Probable Cause on page 2 of this form. (Pen. Code, § 1237.5.)

1. Defendant appeals from a judgment rendered or an order made by the superior court.
   NAME of defendant:
   DATE of the order or judgment:
2. **Complete either item a. or item b. Do not complete both.**
   a. *If this appeal is after entry of a plea of guilty or no contest or an admission of a probation violation, check all that apply:*
      (1) ☐ This appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea. (Cal. Rules of Court, rule 8.304(b).)
      (2) ☐ This appeal is based on the denial of a motion to suppress evidence under Penal Code section 1538.5.
      (3) ☐ This appeal challenges the validity of the plea or admission. *(You must complete the Request for Certificate of Probable Cause on page 2 of this form and submit it to the court for its signature.)*
      (4) ☐ Other basis for this appeal *(you must complete the Request for Certificate of Probable Cause on page 2 of this form and submit it to the court for its signature) (specify):*

   b. *For all other appeals, check one:*
      (1) ☐ This appeal is after a jury or court trial. (Pen. Code, § 1237(a).)
      (2) ☐ This appeal is after a contested violation of probation. (Pen. Code, § 1237(b).)
      (3) ☐ Other *(specify)*:
3. ☐ Defendant requests that the court appoint an attorney for this appeal. Defendant ☐ was ☐ was not represented by an appointed attorney in the superior court.
4. Defendant's mailing address is: ☐ same as in attorney box above.
   ☐ as follows:

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DEFENDANT OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
CR-120 [Rev. January 1, 2017]

NOTICE OF APPEAL—FELONY (DEFENDANT)
(Criminal)

Penal Code, §§ 1237, 1538.5(m);
Cal. Rules of Court, rule 8.304
www.courts.ca.gov

PEOPLE OF THE STATE OF CALIFORNIA VS. Defendant:	CASE NUMBER:

REQUEST FOR CERTIFICATE OF PROBABLE CAUSE

I request a certificate of probable cause. The reasonable constitutional, jurisdictional, or other grounds going to the legality of the guilty plea, no-contest plea, or probation violation admission proceeding are *(specify):*

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

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF DEFENDANT OR ATTORNEY)

COURT ORDER

This Request for Certificate of Probable Cause is *(check one):* ☐ granted ☐ denied.

Date:

JUDGE