

Case No. S277487

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

v.

TONY HARDIN,

Defendant-Petitioner.

Second Appellate District, Division Seven, Case No. B315434
Los Angeles County Case No. A893110
The Honorable Juan Carlos Dominguez, Judge

**APPLICATION TO FILE AMICI CURIAE BRIEF AND
[PROPOSED] BRIEF OF AMICI CURIAE FOR THE
SANTA CLARA COUNTY INDEPENDENT DEFENSE COUNSEL
OFFICE (“IDO”) IN SUPPORT OF DEFENDANT AND
PETITIONER TONY HARDIN**

BRIAN C. McCOMAS
Cal. SBN 273161
Law Office of B.C. McComas, LLP
PMB 1605, 77 Van Ness Ave.,
Ste. 101, San Francisco, CA 94102
Telephone: (415) 814-2465
Facsimile: (415) 520-2310
mccomas.b.c@mccomasllp.com

ERIC WEAVER
Cal. SBN 115208
Attorney at Law
PO Box 6294
Albany, CA 94706
Telephone: (510) 524-2355
Facsimile: (510) 527-1450
weaver115208@gmail.com

Counsel for Amicus Curiae
THE SANTA CLARA COUNTY
INDEPENDENT DEFENSE
COUNSEL OFFICE (“IDO”)

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**APPLICATION FOR LEAVE TO FILE
BRIEF OF AMICI CURIAE BY THE IDO
IN SUPPORT OF PETITIONER TONY HARDIN**

TO: THE HONORABLE CHIEF JUSTICE, PATRICIA GUERRERO, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to the California Rules of Court, Rule 8.520, proposed Amici Curiae respectfully request leave to file the accompanying brief in support of Defendant-Petitioner, TONY HARDIN. Amici focuses on the effects of the Court’s decision on Santa Clara County, which is the most populous in Northern California with nearly 2,000,000 persons. To the extent possible, perspective is lent to the rights of all youths incarcerated for their natural life with no possibility of release across the 34 adult prisons in California.

STATEMENT OF INTEREST BY AMICI

The Santa Clara County Independent Defense Counsel Office (herein “IDO”) provides counsel for criminal defendants and juvenile justice youth in the Superior Court, and sometimes in the Sixth District Court of Appeal and this Court, in cases where the Public or Alternate Defenders have declared a conflict. IDO includes a robust roll of top-notch investigators, paralegals, experts, and other support personnel; provides training and education in the form of MCLE sessions, resource repositories, and mentorship arrangements; and has developed pilot programs designed to implement innovative criminal defense solutions to complex case representation. IDO holds our attorneys to the highest standards of effective criminal defense practice, ensuring they have the skills and tools needed to meet those standards and consistently demonstrate best practices.

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The IDO mission is to achieve optimal results for our indigent clients, while using taxpayer resources efficiently. IDO’s work will be impacted by the Court’s answer to the question presented in this matter, which is:

Does Penal Code section 3051(h) violate the equal protection clauses of the United States and California Constitutions by offering a parole opportunity based on youth-related mitigating circumstances to some young adult offenders convicted of serious crimes, while denying it to young adult offenders sentenced to life without parole, who are similarly situated in all relevant respects?

(Petitioner’s Answering Brief (herein “Answering Brief”), at p. 8.)

There are more than 100 known cases in Santa Clara County impacted by the restrictions on Youth Offender Parole. The IDO has an interest in the fair and even-handed development and application of constitutional issues impacting these young persons, as well as those who may be exposed to sentence of life without the possibility of parole (LWOP) in the future. This brief – in the words of Associate United States Supreme Court Justice Sonia Sotomayor – seeks to “speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”¹ (*Schuetz v. Coal. to Defend Affirmative Action* (2014) 572 U.S. 291, 381, Sotomayor, J., dissenting.)

¹ Like the Associate Justice, the IDO does not intend to reify the socially constructed notion of “race,” but instead refers to “race” as a surrogate for the protected group addressed. (See generally Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice* (1994) 29 Harv.C.R.-C.L. L. Rev. 1.)

**STATEMENTS OF AUTHORSHIP
& MONETARY CONTRIBUTION**

IDO is dedicated to the promise of every person standing equal before the law, regardless of monetary resources. (See *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 and *In re Allen* (1969) 71 Cal.2d 388, 390.) These principles contributed to the proposed Amici Curiae brief provided, *infra*. No party, or counsel for any party, in this matter has authored any part of the brief, nor has any person or entity other than the IDO made any monetary contributions to fund the preparation or submission of this brief. The attached Exhibits A-C have been prepared and approved by the authors in line with Rules of Court, Rule 8.520, subdivisions (f) and (h).

CONCLUSION

Amici respectfully requests leave to file the accompanying brief.

DATED: August 31, 2023

Respectfully Submitted,

/s/ B.C. McComas

BRIAN C. McCOMAS

DATED: August 31, 2023

Respectfully Submitted,

/s/ Eric Weaver

ERIC WEAVER

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

INTRODUCTION & SUMMARY OF ARGUMENT

Youthful offender parole is authorized by age at the time of the offense – under 26 years – in line with the Supreme Court’s recognition that the attributes of youth are not “crime-specific.” (*Miller v. Alabama* (2012) 567 U.S. 460, 473.) Eligible youths may earn release by demonstrating rehabilitation, even if the sentence exceeds their natural lifetime. (*In re Jones* (2019) 42 Cal.App.5th 477, 486-487, concurring opn. of Pollak, P. J.) Adolescent persons sentenced to Life Without the Possibility of Parole (“LWOP”), however, are ineligible for relief from incarceration for offenses committed before age 26, even if completely rehabilitated today.² These youths are unfairly “condemned to live virtually [their] entire life in ignominious confinement, stripped of any opportunity or motive to redeem [themselves] for an act attributable to the rash and immature judgment of youth.” (*People v. Davis* (1981) 29 Cal.3d 814, 832, fn. 10.)

² Section 3051 has four exceptions, listed in subdivision (h), which reads: “This section shall not apply to cases in which [1] sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (I), inclusive, of Section 667, or [2] Section 667.61, or [3] to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age. This section shall not apply to [4] an individual to whom this section would otherwise apply, but who, subsequent to attaining 26 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.” (See also *People v. Williams* (2020) 47 Cal.App.5th 475, rvw. gtd. July 22, 2020, S262229.)

The disparate treatment of youthful persons under Penal Code section 3051 was remedied in *People v. Hardin* (2022) 84 Cal.App.5th 273, 289-90, where the Second District Court of Appeal correctly recognized “that any purported legislatively recognized distinction in culpability between individuals serving a parole-eligible indeterminate life sentence and those sentenced to life without parole is illusory.” On review, the Attorney General argues that the dual purposes of “culpability” and “punishment” demonstrate “that young adult offenders who commit the most serious offenses should have no opportunity for relief from lifetime incarceration.” (Respondent’s Reply Brief (“Reply Brief”), at p. 7.) The State is wrong – similarly situated persons convicted of the most serious crimes in Santa Clara County are not receiving “like treatment” under section 3051. (See, *infra*, Declarations by Mara Hickey, P.I.; Dr. Kathryn Albrecht; and Drs. Rahn Minagawa, Francesca Lehman, and Carl Osborn [Attached as Exhibits A-C], *infra*.)

There are at least three factors demonstrating that section 3051 does not apply in equal fashion by excluding those (1) most subject to socioeconomic disparities during childhood; (2) who end up in prison for life in their youth; but (3) are granted no opportunity for parole despite equal capacity for rehabilitation. Distinguishing against such youthful persons without regard to the factors leading to their imprisonment, but instead solely on “crime-specific” reasons, is unequal protection. Nor would equal application of section 3051 undo most LWOP sentences, as this Court has recognized.

“The Legislature did not envision that the original sentences of eligible youth offenders would be vacated and that new sentences

would be imposed to reflect parole eligibility during the 15th, 20th, or 25th year of incarceration.” (*People v. Franklin* (2016) 63 Cal.4th 261, 278.) Thus, youthful offender parole, like senior parole, merely offers a small number of rehabilitated people the opportunity for release – not to assess “culpability” or impose “punishment” – but “to account for neuroscience research that the human brain—especially those portions responsible for judgment and decision making— continues to develop into a person’s mid-20’s.” (*Hardin, supra*, 84 Cal.App.5th at p. 287, citation omitted.) “The continued operation of the original sentence is evident from the fact that an inmate remains bound by that sentence.” (*Franklin, supra*, 63 Cal.4th at p. 278.)

Mr. Hardin correctly challenges section 3051, subdivision (h), for failing in its purpose of “rehabilitation.” (Answering Brief, at p. 32.) The Attorney General’s contrary analysis would have the Court disregard the historical, racial, and scientific disparities undergirding the unequal exclusion of some youths from parole based on “fictional approach[es] to statutory purpose.” (*Brown v. Merlo* (1973) 8 Cal.3d 855, 865, fn. 7.) This brief – through the lens of Santa Clara County – provides a more “serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals.” (*Newland v. Board of Governors* (1977) 19 Cal.3d 705, 711, citation omitted.) The decision in *Hardin* must be affirmed to equally protect all similarly situated young persons under Article I, section 7 of the California Constitution, and the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

- I. THE ATTORNEY GENERAL ASSUMES THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE IS IMPOSED ON SIMILARLY SITUATED YOUTHS BY IGNORING HOW THEIR EXCLUSION FROM YOUTH OFFENDER PAROLE COMPOUNDS EXISTING SOCIOECONOMIC, STATISTICAL, AND SCIENTIFIC DISPARITIES CONTRARY TO THE PURPOSE OF PENAL CODE SECTION 3051.**
- A. The Historical Legacies of Racism That Disparately Expose Some Adolescent Persons to Factors Contributing to Youth Violence Do Not Justify Lifelong “Punishment” Without Any Consideration of Rehabilitation.**

The State posits that “rational basis review does not require mathematical precision or a perfect fit.” (Respondent’s Opening Brief (herein “Opening Brief”), at p. 35.) The IDO questions whether rational review applies,³ but either way, the Attorney General fails to demonstrate that the alleged purposes of “culpability” and “punishment” justify LWOP for some youths exposed to the greatest predictors of youth violence. Not coincidentally, these factors make those youth “more likely to end up in the public records data from the California Department of Corrections and Rehabilitation.” (Declaration of Mara Hickey, P.I., (herein “Hickey Declaration”), *infra*, Exhibit A, at p. 29.)

³ Enhanced review should apply given the evident racial disparities presented by the pool of youths sentenced to LWOP discussed herein. (See *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 265-266.)

In Santa Clara County, the racial disparities impacting our youth relate back to the displacement of the Ohlone and other tribes who lived in the Valley some 6,000 years before the arrival of the Spanish Commander, Pedro Fage, around 1770. (See Stephen J. Pitti (2003) *The Devil in Silicon Valley*, Princeton Univ. Press, at p. 48.) Over the last 250 years, the creation and pavement of El Camino Real, which in West San Jose runs along the modern-day “Alameda,” has marked the unequal development of wealthier enclaves of the City from the rest. (Hickey Declaration, *infra*, Exhibit A at pp. 27-28.) Some ZIP codes have imposed additional burdens on generations of youthful persons, like in East San Jose, once called “Sal Si Puedes,” meaning “leave if you can.” (*Id.* at p. 28.)

“Framed by the California Indian Genocide (1850-1863) that slaughtered a potential workforce, and the Civil War (1861-1865) that seemingly brought chattel slavery to an end, the [State of California] turned to unpaid or law paid Chinese immigrants.” (Jean Pfaelzer (2023) *California: A Slave State*, at p. 249.) The influx of migrants and refugees working the hardest and most dangerous jobs in the 1800s did not result in permanent residency in the 1900s. (*Devil in Silicon Valley*, at p. 48.) Indeed, up until the 1960s, every single recently developed subdivision in the City of San Jose had at one point included racial covenants excluding non-white people, unless they were domestic employees. (Hickey Declaration, *infra*, Exhibit A at p. 28.)⁴ The legacy of this racialized divide remains in the

⁴ The declarations attached hereto affirm the truth of these citations, but also correspond to larger reports filed with this Court in *In re Senh Duong*, Case No. S277207.

disparate value of the homes and income per family reported in different, but neighboring, ZIP codes today. (*Ibid.*)

The legacy includes the thousands of Japanese-Americans forcibly processed through what is now “Yoshihiro Uchida” Hall (then the “Spartan Complex”) at San Jose State University, before displacement to as far away concentration camps as in Arkansas during World War II.⁵ Vietnamese and other wartime refugees would come to compose more than 10% of the population of the City in the ensuing decades.⁶ Unequal disparities have persisted in the neighborhoods with lower income, lack of full grocery stores, reduced student funding, and other socioeconomic problems. (Hickey Declaration, *infra*, Exhibit A at p. 28.)

Not surprisingly, murder is disproportionately experienced in the most marginalized communities in Santa Clara County. (Hickey Declaration, *infra*, Exhibit A at p. 29.) The disparate impact of the mandatory imprisonment of youth, sometimes for their natural life, is also unequally felt by people of color. (Declaration of Dr. Kathryn Albrecht (herein “Albrecht Declaration”), *infra*, Exhibit B, at p. 32.) Those youths sentenced to LWOP suffer further disparities by exclusion from parole because “[l]arge individual variations in the

⁵ Nicole Calande (February 17, 2022) *The history of WWII Japanese American incarceration in San Jose, CA*, available at: <https://sjtoday.6amcity.com/history-ww2-japanese-american-incarceration> (last accessed July 22, 2023).

⁶ Tran Nguyen (July 9, 2021) *San Jose’s Vietnamese community struggles with its political voice*, San Jose Spotlight, available at: <https://sanjosespotlight.com/san-joses-vietnamese-community-struggles-with-its-political-voice/> (last accessed August 29, 2023).

neurodevelopmental process makes reliance on any particular intermediate age as the basis for different treatment under the law a contravention of fundamental notions of justice and fair dealing.”

(Declaration of Dr. Rahn Minagawa, Dr. Francesca Lehman, and Dr. Carl Osborn (herein “Minagawa, Lehman, and Osborn Declaration”), *infra*, Exhibit C, at p. 35.)

The Attorney General ignores the socioeconomic, demographic, and scientific disparities that impact young persons most likely to be subject to LWOP. The legacies of socioeconomic and childhood trauma endured by those most likely to end up in the CDCR must be confronted so that we address “the racial inequality that exists in our society.” (*Schuetz*, *supra*, 572 U.S. at p. 381, dissenting opn., Sotomayor, J.) Denying select youths the chance at parole, as Mr. Hardin recognizes, proves how the “logic of both the case law and the scientific evidence underpinning the passage of section 3051 fundamentally undermines the rationality of that exclusion.” (Answering Brief, at p. 13.)

B. The Racially Disparate Sentencing of Youthful Persons to Life Without the Possibility of Parole Does Not Justify Denial of the Same Opportunity for Release Granted to Youths of Equal Age Who Are Equally or More “Culpable” of Similar Offenses.

The age-old scientific and legal principle that the character of a juvenile is not as well formed as that of an adult is beyond dispute. (See generally, E. Erikson (1968) *Identity: Youth and Crisis*.) The similarities between youthful offenders in age, maturation, and lack of wisdom renders suspect the conclusion that rehabilitation for

anyone is impossible because “their irresponsible conduct is not as morally reprehensible as that of an adult.” (*Roper v. Simmons* (2005) 543 U.S. 551, 570, citation omitted.) Yet, in Santa Clara County, the younger the defendant, the harsher the charging and sentencing outcome. (Albrecht Declaration, *infra*, Exhibit B at p. 32.) Indeed, as to LWOP, “[a] vast majority of Black and Hispanic defendants are between the ages of 18 and 25, while for white defendants, a majority of such defendants are 26 or older.” (*Ibid.*)

The Attorney General dismisses these and other studies proving “that an individual prosecutor’s discretion to charge the special circumstance allegation often governs whether a defendant will be sentenced under the special circumstance statute.” (Opening Brief, at p. 37.) However, “[e]mpirical studies have shown that ‘the conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability.’” (*People v. McWilliams* (2023) 14 Cal.5th 429, 451, concurring opn. Liu, J., citation omitted.) The empirical studies submitted here prove how implicit bias accumulates over time to result in racial disparities in our carceral system that are “not disputable.”⁷ (Gail S. Perry & Gary B. Melton (1984) *Precedential Value of Judicial Notice of Social Facts: Parham As An Example*, 22 J. FAM. L. 633, 667.)

⁷ To develop further *charging* information, the IDO is litigating motions under Penal Code section 745, subdivision (d). To develop further *sentencing* information, the IDO has pending requests under the CPRA to the CDCR and the Board of Parole Hearings. The data presented here was provided, with some exclusions by the CDCR, in response to prior CPRA requests.

As Mr. Hardin points out, across the State “research shows [how] special circumstance allegations could have been charged in 95 percent of all first degree murder convictions.” (Answering Brief, at p. 12, citing Com. on Rev. of the Pen. Code, Annual Report and Recommendations (2021), p. 51.) In Santa Clara County, public records information provided by the CDCR demonstrates 15.15% (N=15) of defendants sentenced to LWOP by the County are Black, 39.39% (N=39) are Hispanic or Mexican, 22.22% (N=22) are white, and the remaining 23.23% (N=23) are comprised of Asian or Pacific Islander, American Indian or Alaskan Native or defendants of some other race. (Albrecht Declaration, *infra*, Exhibit B at p. 30.) These differences suggest that minority groups have been impacted by LWOP sentences – some 77% of all young persons sentenced to LWOP are persons of color in Santa Clara County.⁸ (*Ibid.*)

The data provided by the CDCR demonstrates that the disparities *increase* as the youthful offender’s age *decreases* in the pool of persons sentenced to LWOP. (Albrecht Declaration, *infra*, Exhibit B at p. 31.) On average, people of color are sentenced to LWOP are younger than white individuals sentenced to life with the opportunity of parole (25.76 years of age compared to 26.87 years of age). (*Id.* at p. 32.) A comparison across racial groups indicates that

⁸ According to the US Census, only 2.9% of individuals in Santa Clara County are Black or African American; 24.7% Hispanic or Latino, 28.3% are white; and the remaining 54% are Asian, Native American, Pacific Islanders; or some other race. (See U.S. Census, Quickfacts: Santa Clara County, available at: <https://www.census.gov/quickfacts/fact/table/santaclaracountycalifornia/PST045222> [last accessed August 17, 2023]).

comparable white defendants are much older. (*Ibid.*)

Three recent examples from Santa Clara County belie the notion that some young persons must be ineligible for parole to preserve prosecutorial discretion to charge the most “culpable:”

(1) Marvin “Pete” Walker’s case was returned to the state courts due to *Batson* error. (See *Walker v. Davis* (9th Cir. 2020) Case No. 19-15087.) He had been convicted of murder, robbery, and other offenses resulting in sentence of death in 1980. (*Ibid.*) On remand, the District Attorney’s Office entered into an arrangement whereby Mr. Walker pleaded to murder (amongst other charges), without special circumstance, resulting in retroactive eligibility for youthful offender parole *nunc pro tunc* to 1995.⁹ (Santa Clara County Case No. 73790.)

(2) Ola’ese Ta’ase was sentenced to life without parole following penalty phase in 2000, as the non-killer accomplice in a liquor store robbery. (Santa Clara County Case No. 189279.) Mr. Ta’ase sought relief via Penal Code section 1172.6 following *People v. Strong* (2022) 13 Cal.5th 698. The special circumstance was struck in exchange for plea to murder, without special circumstance. (Santa Clara County Case No. 189279.) Mr. Ta’ase’s youth offender parole is scheduled for November 2023.¹⁰

⁹ CDCR, Inmate Locator, available at: <https://inmatelocator.cdcr.ca.gov/Details.aspx?ID=C20900> [last assessed August 28, 2023].

¹⁰ CDCR, Inmate Locator, available at: <https://inmatelocator.cdcr.ca.gov/Details.aspx?ID=C20900> [last assessed August 28, 2023].

(3) Senh Duong, whose case has been granted review, was sentenced to LWOP for three murders he did not personally commit. (California Supreme Court Case No. S277207.) Several of his co-defendants were actual killers, but have been released on youth offender parole despite sentences exceeding their life expectancy. (*Ibid.*) Mr. Duong has been entirely denied the opportunity for liberty by the unequal operation of section 3051, despite similar age, prospects for reform, and a more compelling case for parole than his co-offenders. (*Ibid.*)

Mr. Duong’s case demonstrates how there are no objective circumstances explaining why some youth are denied even a chance at parole.¹¹ The unequal application of section 3051 only adds to “[t]he disparate burden of LWOP sentences [that] is felt systematically by race” across the state of California. (Albrecht Declaration, *infra*, Exhibit B at p. 32.) Public records thereby confirm the “racial underpinnings of the concept of incorrigibility have been given empirical expression on an unprecedented scale when it comes to racial disparities in LWOP sentencing.” (Thomas Dichter (2021) *Worst of the Worst: Rehabilitationist Roots of Life without Parole*, *Law, Culture and the Humanities* 2021, Vol. 17(3) 529-549.)

Even the State acknowledges that there should be some constitutional consideration for defendants age 18-25 at the time of

¹¹ The Santa Clara County District Attorney’s Office is applauded for its resentencing efforts in the first two cases, while in the third case the Honorable Judge Helen E. Williams has urged the Higher Courts to address the constitutionality of Penal Code section 3051. (Santa Clara County Case No. C2008022.)

offense. (Opening Brief, at p. 25.) To afford equal protection to all youthful offenders, the opportunity for reform and release cannot be based solely on the discretion of prosecutors who may “act according to established institutional norms and practices that may reflect discriminatory beliefs.” (Paterson, Rapp & Jackson (2008) *The Id, the Ego and Equal Protection in the 21st Century: Building Upon Charles Lawrence’s Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 Conn. L. Rev. 1, 12.) The exclusion of only some youthful offenders from parole eligibility - like Mr. Hardin - “is irrational, given the Legislature’s findings regarding the categorically enhanced capacity of all youthful offenders for rehabilitation.” (Answering Brief, at p. 30.)

C. “Crime-Specific” Justifications for the Unequal Exclusion of Some Youthful Offenders Disregard the Principles of Adolescent Brain Science Applicable to All Young Persons.

The Attorney General chides the Court of Appeal in *Hardin* for “[f]ocusing on certain statements in the legislative history about the neuroscience of the developing brain, the Court of Appeal asserted that the law’s only purpose was to account for youth-related mitigating factors.” (Opening Brief, at p. 19.) However, the principles of Adolescent Brain Science are founded in the law. As the Legislature recently declared in Section 1 of Senate Bill 203: “Developmental and neurological science concludes that the process of brain development continues into adulthood, and that the human brain undergoes significant changes throughout adolescence and well into young adulthood.” (Senate Bill 203, Section 1, Chapter 335. Approved by Governor September 30, 2020.)

The United States Supreme Court recognized “developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.” (*Graham v. Florida* (2010) 560 U.S. 48, 68.) In recognition of the principles of Adolescent Brain Science, the California Legislature reshaped how youth are imprisoned via enactment and amendment of Penal Code section 3051. (See generally, *Jones, supra*, 42 Cal.App.5th at pp. 486-487, concurring opn. of Pollak, P. J.) Thus, as the Court of Appeal in *Hardin* correctly recognized, youthful offender parole should not be foreclosed for rehabilitated youths because, without individualized consideration at sentencing, it is not possible to say today whether any one of them is “irreparably corrupt, beyond redemption, and thus unfit ever to reenter society[.]” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

Nor are the principles behind Adolescent Brain Science constrained by borders, ZIP Codes, or racial ideologies, although geographical borders impact racial demographics, the likelihood of LWOP sentence, and the childhood trauma imparted upon our youth. (Hickey Declaration, *infra*, Exhibit A, at p. 27; Albrecht Declaration, *infra*, Exhibit B, at p. 30; and Minagawa, Lehman, and Osborn Declaration, *infra*, Exhibit C, at p. 33.) Indeed, neighboring ZIP codes in Santa Clara County afford “wildly different lived experiences” for those living within, which explains why some youths growing up in these communities become disaffected, further contributing to cycles of incarceration, crime, and violence. (Hickey

Declaration, *infra*, Exhibit A at p. 29.) The trauma results in greater rates of violence:

[T]here was a total of 57 homicides in ZIP code 95122 between 2004 and 2021. There was not one year without a homicide and 23 of these homicides remain unsolved. To the contrary, ZIP code 95126 saw a total of 17 homicides between 2004 and 2021. During seven of those years there were no homicides, and only one homicide remains unsolved.

(Hickey Declaration, *infra*, Exhibit A at p. 29.)

The effects of such trauma on young persons in San Jose, are as equally debilitating as on youths in “China, Colombia, Cyprus, India, Italy, Jordan, Kenya, Thailand, and the Philippines.”

(Minagawa, Lehman, and Osborn Declaration, *infra*, Exhibit C at p. 34.) Yet, as Drs. Rahn Minagawa, Francesca Lehman, and Carl Osborn explain, young persons are capable of rehabilitation, despite having experienced trauma impacting their “ability to suppress maladaptive emotions, impulses and behaviors in favor of more mature, adaptive responses[, which] is considerably diminished in the presence of certain environmental cues (e.g., the perception of threats, the presence of peers).” (*Ibid.*) The adolescent brain continues to mature and transitions from traumatic experiences within similar age groups, “regardless of cultural, political, legal, demographic, social and religious domains.” (*Id.* at p. 33.)

Thus, equal protection cannot be achieved simply by focusing “between same-age offenders based solely on the crime they committed.” (*Hardin, supra*, 84 Cal.App.5th at p. 288, citation omitted.) As Petitioner Hardin observes: “Young people convicted of

special circumstance murder are not exceptions to the biological rule.” (Answering Brief, at p. 29.) “The arbitrary division of the full period of adolescent brain development into numerical subgroups for legal purposes runs contrary to the substantial and growing body of settled scientific knowledge.” (Minagawa, Lehman, and Osborn Declaration, *infra*, Exhibit C at pp. 35-36.) All youths must be provided equal treatment under section 3051 to ensure that, if rehabilitated, they will not “on average serve more years and a greater percentage of [their] life in prison than an adult offender[.]” (*Graham, supra*, 560 U.S. at p. 72, citation omitted.) *Hardin* should be affirmed.

II. EQUAL APPLICATION OF YOUTHFUL OFFENDER PAROLE CORRECTS THE CRUEL AND/OR UNUSUAL PRACTICE OF MANDATING LIFE IMPRISONMENT, WITHOUT REGARD FOR REHABILITATION, IN LINE WITH EVOLVING STANDARDS OF DECENCY.

The Attorney General faults Petitioner Hardin for relying on Eighth Amendment jurisprudence, which the State argues “cannot fairly be read to eliminate penal considerations as legitimate concerns, even for juvenile offenders.” (Reply Brief, at p. 9.) At the same time, the Attorney General argues that the limits on cruel and/or unusual punishment somehow demonstrate how the “‘age of the offender and the nature of the crime’ still bear on the overall assessment of whether a sentence is excessive.” (*Id.* at p. 10, citations omitted.) The State cannot have it both ways. Either, the exclusion of similarly situated youth under section 3051 violates equal protection, or the mandatory imposition of LWOP without consideration of youth at sentencing, much less their rehabilitation

today, is cruel and/or unusual. (See, e.g., *In re Pers. Restraint of Monschke* (Wash. 2021) 482 P.3d 276 [striking mandatory LWOP for 18-20 year old persons as cruel and unusual].)

As this Court has recognized: “[T]he mitigating features of youth can be dispositively relevant, whether the crime is a nonhomicide offense or a heinous murder punishable by death if committed by an adult.” (*Gutierrez, supra*, 58 Cal.4th at p. 1381, citations omitted.) “Crime-specific” facts cannot thereby “support the exclusion of felony-murder special-circumstance offenders, including robbery special-circumstance murderers, from the youth offender parole scheme.” (Opening Brief, at p. 37.) Nor are “culpability” and “punishment” sufficient rationales for incarcerating young persons for their natural life when the mitigating attributes of youth are not “crime-specific.” (*Miller, supra*, 567 U.S. at p. 473.)

Yet, the Attorney General claims that “[a] proper understanding of the rational basis standard preserves space for our elected leaders to take incremental legislative steps and to enact laws that reflect compromise.” (Reply Brief, at p. 40.) “*Miller* nowhere suggested that legislatures may presume life without parole to be the proper punishment for entire categories of juvenile offenders or offenses.” (*Gutierrez, supra*, 58 Cal.4th at p. 1381.) Nor does the constitutional right to equal protection presume that some youthful persons are incapable of rehabilitation. (*Ibid.* [“A presumption in favor of life without parole for a subgroup of juveniles who commit any one of a subgroup of crimes would raise a serious constitutional question under *Miller*.”].)

There is no basis to withhold a chance at youthful offender

parole from rehabilitated young persons simply because the constitutional rule under “*Miller* declined to adopt any such limitation, *instead citing evidence that developmental immaturity persists through late adolescence.*” (*Gutierrez, supra*, 58 Cal.4th at p. 1380, citations omitted and emphasis added.) After mandatory sentencing, youth in relation to the offender’s “individual culpability” without later review for parole. (See, e.g., *People v. Dillon* (1983) 34 Cal.3d 441, 480.) As Petitioner Hardin aptly recognizes, there is “no rational relationship between the group left out by the Legislature —individuals sentenced to life without parole—and the broad rehabilitative purposes of the statute.” (Answering Brief, at p. 34.)

The problems presented can be resolved by equal application of section 3051 to all youthful offenders, as intended to recognize the diminished culpability “based on their stage of cognitive development.” (*Hardin, supra*, 84 Cal.App.5th at p. 289.) Granting rehabilitated youth a chance at parole avoids “challenge[s to] the constitutionality of the long years of imprisonment the inmate has served.” (*In re Palmer* (2021) 10 Cal.5th 959, 971.) The State of California can thereby move closer to “the evolving standards of decency that mark the progress of a maturing society.” (*Trop v. Dulles* (1958) 356 U.S. 86, 101, plur. opn. of Warren, C.J.)

CONCLUSION

For the foregoing reasons, the IDO respectfully submits that the decision in *Hardin* should be affirmed.

DATED: August 31, 2023 Respectfully Submitted,
/s/ B.C. McComas
BRIAN C. McCOMAS

DATED: August 31, 2023 Respectfully Submitted,
/s/ Eric Weaver
ERIC WEAVER

CERTIFICATE OF COMPLIANCE

I hereby certify that the proposed amici curiae brief, including footnotes and excluding the tables, signature blocks, this certification, and attached exhibits, was written in Century725 BT in 13 point font and contains 4,285 words as determined by Wordperfect.

DATED: August 31, 2023 Respectfully Submitted,
/s/ B.C. McComas
BRIAN C. McCOMAS

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**- EXHIBIT A -
DECLARATION OF MARA HICKEY, P.I.**

I, Mara Hickey, P.I., declare:

1. I am a licensed private investigator authorized to assist in state and federal courts in California. I am also a mitigation specialist with experience in cases involving sentences of life without the possibility of parole. I've provided some of these services for indigent persons through Santa Clara County Independent Defense Counsel Office ("IDO").

2. I've reviewed the attached Amicus Curiae brief by IDO and agree with the portions attributed to this declaration. The facts sworn to herein have been expounded upon in my filing in In re Senh Duong, Case No. S277487. I'm submitting a condensed version of my report here.

3. ZIP Code 95122 (East San Jose) and ZIP Code 95126 (Rose District) are separated by less than three miles within the City of San Jose, but contain vastly different predictors of youth violence. The disparities demonstrate how further application of the most severe criminal punishments on select youths does little for crime prevention. The unequal application of circumstances between geographic borders should be considered before laws are interpreted so as to reenforce further burdens upon already disadvantaged youths therein.

4. Some of the disparities that can be seen in modern-day San Jose are explained by the historical legacies of racially inspired zoning requirements. The creation and pavement of El Camino Real, which runs along West San Jose, would come to mark the unequal

development of some of the wealthier enclaves of the City from the rest for more than 250 years. The dividing neighborhoods became known for their wealth, as in the Rose Garden neighborhood, aptly known for its beautiful gardens, contrary to East San Jose, once called “Sal Si Puedes,” meaning you “leave if you can,” perhaps because of the poor road work (or just a clever play on words).

5. Racial discrimination in housing in San Jose was not illegal until 1968, so every single recently developed subdivision in the City had at one point included racial covenants excluding non-white people, unless they were domestic employees. Today, one can still see evident divides in the average household income, like in ZIP Code 95122 where the median household income is \$56,140. This income, which is less than half of the city average and just 40% of the county average, provides for an average household size of five people. Approximately three miles away, in ZIP Code 95126, the median household income is \$132,649, which provides for an average household size of two persons.

6. There are other indicators of disparity, like how there is an undue concentration of liquor stores in East San Jose. There is only one current affordable housing project in this neighborhood, but 15 ongoing projects in the Rose District. The severity of the code complaints in the Rose District are not the same as in East San Jose, which also offers far fewer full use grocery stores. The needs of the students in these respective districts are reflected by per child allocation, inadequate funding, and lack of mentors.

7. The disparities result in more active policing as well; first and foremost, as demonstrated in the 1,036 or so pedestrian stop

searches in ZIP Code 95122 in 2019. For all of San Jose, there were 7,847 similar pedestrian stops. East San Jose thereby contained 5.6% of the city's population, but 13.2% – more than double the overall rate – of all pedestrian stops.

8. The San Jose Police Department has reported, in response to a CPRA request, that there was a total of 57 homicides in ZIP Code 95122 between 2004 and 2021. There was not one year without a homicide and 23 of these homicides remain unsolved. To the contrary, ZIP Code 95126 saw a total of 17 homicides between 2004 and 2021. During seven of those years there were no homicides, and only one homicide remains unsolved.

9. Comparison of these two ZIP Codes reveals many stark contrasts as documented by data for economic development, educational achievement, policing, and wealth. The youths in these different areas of San Jose grow up to have wildly different lived experiences. Those subject to the greatest predictors of youth violence are more likely to end up in the public records data from the California Department of Corrections and Rehabilitation. Unfortunately, for those youths, not all ZIP Codes are created equally.

I declare that the foregoing is true and correct under penalty of perjury, as defined by California, and that this declaration was executed on August 30, 2023 in San Jose, California.

/s/ Mara Hickey
MARA HICKEY

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- EXHIBIT B -
DECLARATION OF DR. KATHRYN ALBRECHT, J.D./PH.D.

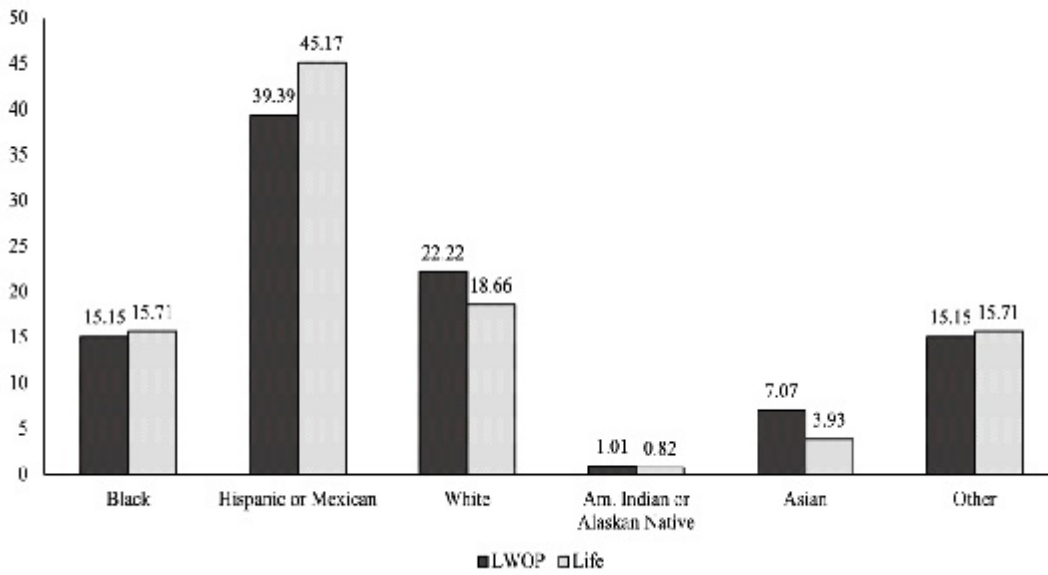
I, Kathryn Albrecht, J.D/Ph.D, declare:

1. I have degrees in sociology, law, and computational data via the University of Northwestern and its Law School. I have provided analysis in several criminal cases involving sentence of life without the possibility of parole. Some of those cases involve Santa Clara County Independent Defense Counsel Office (“IDO”).

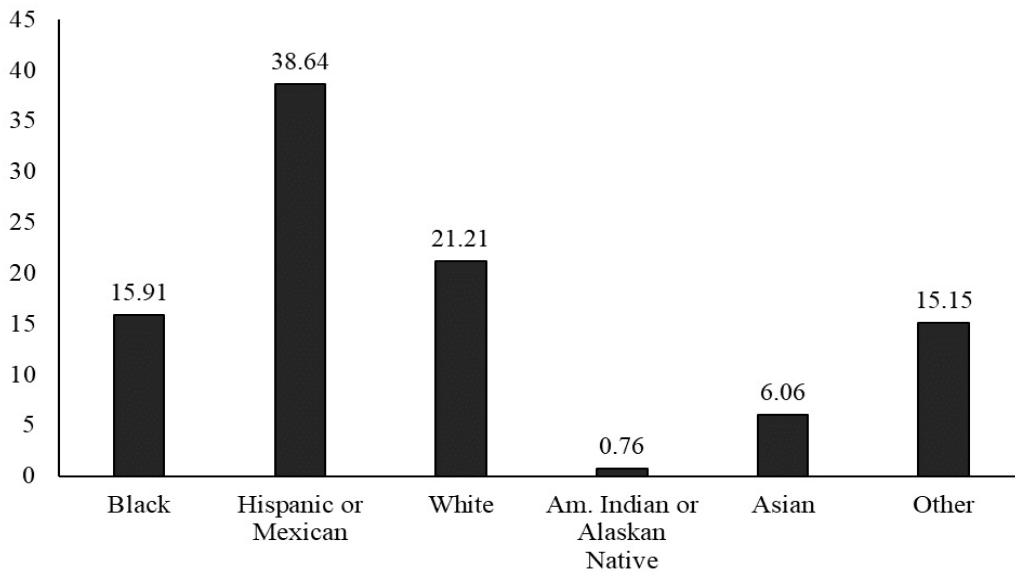
2. I’ve reviewed the attached Amicus Curiae brief by IDO and agree with the portions attributed to this declaration. The facts sworn to herein are expounded upon in my reports in *In re Senh Duong*, Case No. S277487. I’m submitting a condensed version here.

3. I’ve reviewed two sets of data compiled from CPRA requests to the California Department of Corrections and Rehabilitation. We have been able to validate the data for 132 individuals sentenced to LWOP in Santa Clara and the 611 individuals sentenced to Life. 15.15% (N=15) of defendants sentenced to LWOP are Black, 39.39% (N=39) are Hispanic or Mexican, 22.22% (N=22) are white, and the remaining 23.23% (N=23) are comprised of Asian or Pacific Islander, American Indian or Alaskan Native or defendants of some other race. The demographic statistics for Life sentences are similar, though Hispanic individuals comprise more of the defendant pool. For Life sentences, 15.71% (N=15.71) are Black, 45.17% (N=276) are Hispanic or Mexican, 18.66% (N=114) are white, and the remaining 20.46% (N=125) are comprised of Asian or Pacific Islander, American Indian or Alaskan Native or some other race:

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4. According to the US Census, only 2.9% of individuals in Santa Clara County are Black or African American; 24.7% Hispanic or Latino, 28.3% are white; and the remaining 54% are Asian, Native American, Pacific Islanders; or some other race. However, the demographics are not represented in the pool of youths eligible for LWOP due to charging determinations:



5. On average, individuals sentenced to the more punitive LWOP are younger than individuals sentenced to Life with the opportunity of parole (25.76 years of age compared to 26.87 years of age). The average white LWOP defendant is 29.11, where the average Hispanic defendant is 25.67. A vast majority of Black and Hispanic defendants are between the ages of 18 and 25, while for white defendants, a majority are 26 or older.

6. Additional demographic analysis across the state of California demonstrates that the burden of LWOP sentences is correlated with race. Simple pair-wise correlations show a strong positive relationship between the percentage of minority residents in a county and the number of LWOP sentences given in that county (0.38 for the comparison between percentage Black and 0.23 for the comparison between percentage Hispanic). The disparate burden of LWOP sentences is felt systematically by race.

7. Black and Hispanic individuals are overrepresented in LWOP sentences beyond what we would expect based on population demographics alone. These results are consistent with the finding that white defendants who receive the most severe punishments are significantly older than Black and Hispanic defendants. The findings merit careful consideration given the seriousness of the punishment.

I declare that the foregoing is true and correct under penalty of perjury, as defined by California, and that this declaration was executed on August 30, 2023 in Minneapolis, Minnesota.

/s/ Dr. Kathryn Albrecht

KATHRYN ALBRECHT

- EXHIBIT C -
DECLARATION OF DR. RAHN MINAGAWA,
DR. FRANCESCA LEHMAN, AND DR. CARL OSBORN

We, the foregoing doctors, declare:

1. We are licensed psychologists with experience testifying in criminal, juvenile, and civil proceedings. We have provided psychological analysis in numerous trials, appeals, and post-conviction proceedings involving sentences of life without the possibility of parole for juveniles and adults. We've provided some of these services for Santa Clara County Independent Defense Counsel Office ("IDO").

2. We've reviewed the attached Amicus Curiae brief by IDO and agree with the portions attributed to this declaration. The facts sworn to herein have been expounded upon in our report in *In re Senh Duong*, Case No. S277487. We are submitting a condensed version of that report here.

3. Advances in neuroscience and developmental psychology have dispelled longstanding notions about the transition from adolescence to adulthood. Converging evidence demonstrates that the hallmark cognitive, emotional and behavioral features of adolescence continue well into the mid 20's. These include many of the risk taking behaviors that can lead to criminal charges.

4. The cross cultural research supporting this fact is robust, indicating that the incidence of risk-taking behaviors, by both adolescents (ages 14-17) and young adults (ages 18 to 20), occurs within these age groups regardless of cultural, political, legal, demographic, social and religious domains. For example, a 2018

study concluded that, “the developmental patterns in sensation-seeking and still maturing self-regulation observed previously in American and Western European samples are found in other parts of the world as well, in countries that vary considerably with respect to their cultural and economic contexts.”¹² Their subjects included samples from China, Colombia, Cyprus, India, Italy, Jordan, Kenya, Thailand, and the Philippines. Clearly, teens are teens, regardless of their cultures of origin.

5. Given what is now known, and generally accepted, about adolescent brain development in the scientific community, it is clear that for individuals between the ages of 18 and 20, important structures within the brain are still developing, particularly the connections within the brain between the limbic system and the prefrontal cortex. Interactions between the dopaminergic and GABAergic systems underlie these maturational changes in brain structure, supporting enhanced network synchronization, specialization and connectivity, all of which must transpire before adult levels of cognitive control can occur.

6. Research on decision-making processes in middle and late adolescence reveals that the ability to suppress maladaptive emotions, impulses and behaviors in favor of more mature, adaptive responses is considerably diminished in the presence of certain environmental cues (e.g., the perception of threats, the presence of peers). Elevated neural and behavioral reactivity to these cues due to

¹² Steinberg, L., et al (2018) *Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation*, *Developmental Science*, 21(2):1-26. doi:10.1111/desc.12532.

developmental immaturity underlies the limited capacity of middle and late adolescents to regulate more primitive impulses. Thus, a useful marker of adult functioning might be a relative imperviousness to real-world context, rather than various static measures of neural activation or connectivity.

7. In light of these findings, both clinicians and neurodevelopmental researchers have begun to refer to the group of individuals who are 18 to 20 years old as the “late adolescent class.” And while the World Health Organization defines adolescents as individuals in the age range of 10-19 years, they also define youth as those 15-24 years old. In contrast, the Academy of Pediatrics adopts a more granular scheme, defining adolescence as 11 to 21 years of age, subdividing that group into early (ages 11-14 years), middle (ages 15-17 years), and late (ages 18-21 years) adolescence. Finally, the United Nations simply defines youths as those between the ages of 15 and 24 years (U.N. Dep. Econ. Soc. Aff. 2018). Regardless of these slight numerical distinctions, these taxonomies all recognize and highlight the same underlying fact, that these young persons are not yet adults.

8. The studies relied upon here have been repeatedly replicated during the 19 years since *Roper v. Simmons* (2005) 543 U.S. 551, and are now considered settled science in the field of neurodevelopment. Furthermore, large individual variations in the neurodevelopmental process makes reliance on any particular intermediate age as the basis for different treatment under the law a contravention of fundamental notions of justice and fair dealing. The arbitrary division of the full period of adolescent brain development

into numerical subgroups for legal purposes runs contrary to the substantial and growing body of settled scientific knowledge.

I declare that the foregoing is true and correct under penalty of perjury, as defined by the State of California and the United States, and that this declaration was executed on August 31, 2023 in San Diego, California.

/s/ Dr. Rahn Minagawa

DR. RAHN MINAGAWA

I declare that the foregoing is true and correct under penalty of perjury, as defined by the State of California and the United States, and that this declaration was executed on August 30, 2023 in San Diego, California.

/s/ Dr. Francesca Lehman

DR. FRANCESCA LEHMAN

I declare that the foregoing is true and correct under penalty of perjury, as defined by the State of California and the United States, and that this declaration was executed on August 30, 2023 in Carmel Valley, California.

/s/ Dr. Carl Osborn

DR. CARL OSBORN

PROOF OF SERVICE

I, Winnie Liu, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the above referenced action. My place of employment and business address is PMB 1605, 77 Van Ness Ave., Ste. 101, San Francisco, CA 94102.

On August 31, 2023, I served the attached **APPLICATION TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICI CURIAE FOR THE SANTA CLARA COUNTY INDEPENDENT DEFENSE COUNSEL OFFICE (“IDO”) IN SUPPORT OF DEFENDANT AND PETITIONER TONY HARDIN** by placing a true copy thereof in an envelope addressed to the person named below at the address shown, and by sealing and depositing said envelope in the United States Mail in San Francisco, California, with postage thereon fully prepaid or by electronic filing:

The Santa Clara County Independent Defense Counsel Office 373 W. Julian Wa, Ste. 3700 San Jose, CA 95110	Clerk of Court Los Angeles Superior Court 312 North Spring Street Los Angeles, CA 90012
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On August 31, 2023, I served the attached **APPLICATION TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICI CURIAE FOR THE SANTA CLARA COUNTY INDEPENDENT DEFENSE COUNSEL OFFICE (“IDO”) IN SUPPORT OF DEFENDANT AND PETITIONER TONY HARDIN** by transmitting a PDF version of this document by electronic mailing to each of the following:

Clerk of Court Court of Appeal, Second District Ronald Reagan State Bldg. 300 S. Spring Street Los Angeles, CA 90013 (Via Truefiling Service)	Heidi Rummel USC Post-Conviction Justice Project 699 Exposition Blvd University Park Los Angeles, CA 90089 Counsel for Petitioner
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<p>Helen H. Hong Office of the Attorney General 600 West Broadway, Ste. 1800 San Diego, CA 92101 (Via Truefiling Service)</p> <p>Nima Razfar Office of the Attorney General 300 South Spring Street, Ste 1700 Los Angeles, CA 90013 (Via Truefiling Service)</p>	<p>(Via Truefiling Service)</p> <p>William D. Temko Munger, Tolles & Olson Llp 350 South Grand Avenue Fiftieth Floor Los Angeles, California 90071-3426 (Via Truefiling Service)</p> <p>Steven Katz, San Diego Deputy District attorney (Service via email)</p>
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I declare under penalty of perjury that the foregoing is true and correct. Signed on August 31, 2023, at San Francisco, California.

/s/ Winnie Liu

WINNIE LIU

Document received by the CA Supreme Court.