Filed 5/10/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO DE JESÚS NUÑEZ, Defendant and Appellant.	G042873 (Super. Ct. No. 01ZF0021) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Reversed and remanded.

Equal Justice Initiative, Bryan A. Stevenson, Aaryn M. Urell; and Jack M. Earley for Defendant and Appellant.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Kristine Gutierrez and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

In an earlier habeas petition in this matter, we concluded imposing a sentence of life in prison without the possibility of parole (LWOP) on a 14-year-old defendant convicted of aggravated kidnapping violated the Eighth Amendment and Article I, section 17 of the California Constitution. (*In re Nuñez* (2009) 173 Cal.App.4th 709, 729-730 (*Nuñez*) [noting "perverse distinction" in sentencing scheme providing for LWOP for juveniles under age 16 who commit aggravated kidnapping, but 25 years to life if they murdered their victims with special circumstances].) Accordingly, we directed the trial court to conduct a new sentencing hearing for Nuñez consistent with our opinion. The trial court at resentencing imposed five consecutive indeterminate life terms for Nuñez's kidnapping and other nonhomicide offenses, plus five consecutive 20-year enhancements for his gun use. By not imposing an LWOP term, the trial court technically granted Nuñez the possibility of parole — albeit after 175 years.

Here, we explain again that juveniles who commit nonhomicide offenses do not share identical culpability with adult offenders who receive LWOP sentences for the same offenses. (*Nuñez*, *supra*, 173 Cal.App.4th at p. 726 ["Age . . . matters" and "Youth is generally relevant to culpability"].) The United States Supreme Court recently determined the immature and potentially malleable nature of juveniles precludes a judgment at the outset that a nonhomicide juvenile offender will never be fit to reenter society. (*Graham v. Florida* (2010) __ U.S. __; 130 S.Ct. 2011 (*Graham*).) *Graham* invalidated a de facto sentence of life without the possibility of parole as a sentencing option for juveniles who do not kill. (*Id.* at p. 2030.) As a practical matter, the consecutive life sentences the trial court imposed here denied Nuñez any possibility of receiving a parole hearing. We perceive no sound basis to distinguish *Graham*'s

reasoning where a term of years beyond the juvenile's life expectancy is tantamount to an LWOP term.

In reaching this conclusion, we agree with *People v. Mendez* (2010) 188 Cal.App.4th 47 (*Mendez*) [84-year sentence for 16 year old's nonhomicide offenses violates Eighth Amendment], and we disagree with *People v. Ramirez* (2011) 193 Cal.App.4th 613 (*Ramirez*), which upheld a minimum 120-year prison sentence for a juvenile convicted of three attempted homicides.[1] We part company with *Ramirez* because a term of years — no less than an actual LWOP sentence — violates constitutional standards when it predetermines juvenile nonhomicide offenders are irredeemable. We disagree with *Ramirez* that a sentence for a term of years exceeding the life expectancy of a juvenile, but without the LWOP label, passes constitutional muster based on a theoretical, but illusory parole date. Consequently, we reverse Nuñez's sentence and remand for another sentencing hearing consistent with this opinion.

I

FACTUAL AND PROCEDURAL BACKGROUND

Nuñez, at age 14 and in a period of less than 36 hours in April 2001, committed several serious and violent offenses that posed such a grave danger to others "it is fortuitous . . . no one died or was injured as a result of [his] conduct." (*Nuñez*, *supra*, 173 Cal.App.4th at p. 726.) We detailed these kidnapping and four attempted murder offenses in our prior opinion. (*Id.* at pp. 716-719.) In summary, Nuñez and at least one much older compatriot armed themselves with an AK-47 and other guns, surprised a two-vehicle convoy of illegal immigrants, surrounded and fired their weapons

[1] The *Ramirez* majority relied on *People v. Caballero* (2011) 191 Cal.App.4th 1248, but the California Supreme Court has since granted review in *Caballero* (review granted April 13, 2011, S190647).

at one of the vehicles as it sped away, and kidnapped the driver of the other vehicle, Delfino Moreno. Nuñez fired a handgun at the departing van, held the gun to Moreno's head while he and a partner forced Moreno into a waiting vehicle, and kept a gun pointed at Moreno while holding him hostage overnight.

The next day, the kidnappers' ransom demands went awry and, in a lengthy chase along Long Beach surface streets and Southern California freeways, Nuñez fired the AK-47 from the front passenger seat in two volleys, discharging three to six shots and then eight to 10 shots at officers pursuing in several vehicles, including a marked car with its overhead lights and siren activated. The chase ended with Nuñez's vehicle exiting the freeway and crashing to a halt, where he was apprehended after fleeing on foot. Investigators later found bullet holes in the front hood, the right door frame, the right side-view mirror, the roof, the front push bar, and the overhead lights of the pursuing officers' vehicles, and inside one police car in the rifle rack between the driver's and passenger's seats. One shot had struck within a foot of one officer's head and another within four to six inches of a different officer. Moreno had been handcuffed and sitting in the back seat of Nuñez's vehicle during the chase, and one of Nuñez's gunshots blew out the back window above Moreno's head.

Nuñez testified Moreno hatched the alleged kidnapping as a ruse to extort a ransom from his smuggling operation cohorts. Nuñez claimed he was not part of the initial abduction, but met Moreno that night at a party, where Nuñez accepted Moreno's invitation to join the scheme. During the ensuing chase, Nuñez fired his weapon the first time at two unmarked vans because he was "scared . . . that they're following us" and the second time because he feared the pursuers, who he believed were "narcos" in the smuggling underworld, were "gonna try and do something to us." Moreno had ordered

him to fire. The initial loud report of his gun caused a ringing in his ears, the violent recoil of the weapon stunned him and blurred his eyesight, and the shattered rear window also obstructed his vision. He claimed he did not hear the police sirens or see any police cars until just before his vehicle crashed.

During deliberations, the jury sent a note asking whether the kidnapping charge applied if Nuñez was absent during the abduction, but after the trial court cited the relevant instructions, the jury convicted Nuñez of kidnapping for ransom, four counts of attempted murder, evading police, and street terrorism, and found gang and firearm enhancements true on each count.

The trial court imposed an LWOP term on the aggravated kidnapping conviction and lengthy sentences on the other counts, but Nuñez did not raise a constitutional challenge in his initial appeal. We affirmed his conviction in an unpublished opinion. (*People v. Nunez* (Dec. 21, 2004, G032462) [nonpub. opn.].) New counsel subsequently filed a habeas petition on Nuñez's behalf in the California Supreme Court, which issued an order to show cause in this court on the question whether imposing an LWOP term on the kidnapping count violated the Eighth Amendment and article I, section 17 of the California Constitution.

Nuñez's unrebutted habeas showing established he responded positively to juvenile camp staff in an earlier commitment for a burglary offense and that, at the time of the present offenses, he still suffered posttraumatic stress disorder from being shot on his bicycle a year and a half earlier — when he witnessed his brother's slaying by a gangmember. The perpetrator shot Nuñez's 14-year-old brother Jose in the head and killed him when Jose ran to Nuñez's aid after Nuñez was shot. A defense expert opined in a habeas declaration that "'Nuñez's mental functioning and behavior was diminished

beyond that typical of 14-year-old children by mental illness, namely *post-traumatic stress disorder* and *major depression*, as well as adverse developmental factors including early alcohol and drug use, neglect and abuse, and possible *cognitive defects*.'" (*Nuñez*, *supra*, 173 Cal.App.4th at p. 722, first italics added.)

Following remittitur after our decision in *Nuñez*, the trial court conducted a new sentencing hearing. The trial court struck the LWOP sentence on the kidnapping count, and imposed an indeterminate life sentence instead, plus a consecutive 20-year term on a firearm enhancement (Pen. Code, § 12022.53, subd. (c); all further statutory references are to this code unless noted). The court then reimposed, as it had at Nuñez's original sentencing hearing, consecutive indeterminate life sentences for each of the four attempted murder counts, plus a consecutive 20-year firearm enhancement on each of those counts (*ibid.*). The court also imposed concurrent sentences as follows: two years for street terrorism and, based on Nuñez's gun and gang enhancements, 11 years for a Vehicle Code violation for evading police. The trial court explained its sentence this way: "[T]here is clearly a tension between the Father Flanagans of the world and the victims of gang violence[,] [¶] . . . [¶] Mr. Nunez is not Mickey Rooney, and I don't believe in the saying that there is no such thing as a bad boy." Nuñez now appeals.

II

DISCUSSION

A. *The Trial Court's Sentence Is Subject to Review*

The Attorney General argues Nuñez may not appeal the aggregate sentence the trial court imposed on remand and, even if an appeal lies, the constitutional issue is not ripe for review. Neither argument has merit. First, the Attorney General asserts that because the only issue before us in Nuñez's successful habeas challenge was his LWOP

sentence for aggravated kidnapping, and because we directed the trial court to vacate that term and resentence Nuñez, the trial court's decision to reimpose the same sentences on other counts and again run them consecutively is beyond review. The Attorney General notes Nuñez could have challenged the sentencing terms on these other counts and their combined effect the first time the trial court imposed them, but failed to do so.

The Attorney General's attempt to thwart review fails. Our order granting Nuñez's habeas petition did not limit resentencing to the aggravated kidnapping conviction, but instead specifically directed the trial court to conduct "a new sentencing hearing consistent with this opinion." (*Nuñez*, *supra*, 173 Cal.App.4th at p. 739.) The trial court was free to consider, in light of the constitutional command forbidding an LWOP sentence (*ibid.*), whether imposing a term of years tantamount to the same sentence violated the constitution. In any event, a sentencing reversal "restore[s]" a defendant "to his original position as if he had never been sentenced . . . ." (*Van Velzer v. Superior Court* (1984) 152 Cal.App.3d 742, 744.) We did not direct the trial court to reimpose the same sentences it previously imposed, nor to impose consecutive sentences, and the court's decision to do so resulted in a new sentence, subject to review.

The Attorney General also argues Nuñez's challenge is not ripe because "[t]he laws regarding parole eligibility could change" and because "one cannot predict appellant's behavior in prison." True, but these observations are without legal significance. Otherwise, the Attorney General's position would render every indeterminate criminal sentence beyond appellate review. It does not follow logically that potential changes in parole eligibility or a defendant's future conduct in prison insulates a criminal sentence from appellate review. Denying appellate review because future legislation or Nuñez's conduct might moot his constitutional claims would defer

resolution of his appeal based on nothing more than speculation.[2] We must evaluate the sentence the trial court actually imposed, not wait on later developments that may or may not occur.

The Attorney General's insinuation Nuñez will perform poorly in prison similarly miscasts the issue, which is not whether Nuñez is entitled to parole, but whether a parole board may one day consider the issue. Nuñez's prison conduct *could* make parole an unlikely occurrence. But the issue now is the validity of a sentence denying any possibility of a parole hearing, an advance judgment which may operate in a self-fulfilling fashion. (See *Graham*, *supra*, 130 S.Ct. at p. 2032 ["A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual"]; accord, *People v. Davis* (1981) 29 Cal.3d 814, 832, fn. 10 [LWOP sentence "strip[s]" a minor "of any opportunity or motive to redeem himself for an act attributable to the rash and immature judgment of youth"].) At present, Nuñez's prison behavior, whether poor or exemplary, could not affect his parole chances because the trial court's sentence effectively denied parole in advance by preventing any hearing during his lifetime.

B. *The Trial Court's Sentence Requires Nuñez to Serve 175 Years before He Is Eligible for Parole*

Relying on the technical distinction that "appellant was not sentenced to LWOP," the Attorney General argues that Nuñez's sentence, "while lengthy, does not foreclose the possibility that he may one day be eligible for parole."[3] The Attorney

---

[2] See, e.g., *Bailing Out on Youthful Offenders*, L.A. Times (Sept. 1, 2010) [Assembly rejects bill proposing screening mechanism for juvenile LWOP defendants to demonstrate reform and petition for parole after 25 years].

[3] The Attorney General's defense of the trial court's sentence echoes the scenario Justice Stanley Mosk described in the following fictional colloquy: "Judge: I

General does not address Nuñez's calculation he must serve 175 years before he first becomes eligible for parole. The calculation is accurate. The trial court sentenced Nuñez to five consecutive indeterminate life sentences, plus a consecutive, determinate 20-year enhancement (§ 12022.53, subd. (c)) on each of the five life sentences. Nuñez must first serve the consecutive 20-year determinate terms (§ 669) "and no part thereof shall be credited toward the person's eligibility for parole" (*ibid.*). Then he must serve at least 15 years of each consecutive life sentence before he becomes eligible for parole consideration at an initial parole suitability hearing (§§ 186.22, subd. (b)(5); 3046, subds. (a)(2) & (b)). Consequently, each of the life sentences with its respective 20-year enhancement precludes Nuñez from receiving a parole hearing for 35 years, a figure the trial court quintupled by imposing consecutive sentences on all five life counts. Thus, following writ relief invalidating Nuñez's LWOP sentence, the trial court imposed a sentence requiring Nuñez to serve 175 years before qualifying for a parole hearing. We now turn to the merits of the trial court's sentence.

C. *Sentencing a Juvenile to a 175-Year Prison Term for Nonhomicide Offenses Is Unconstitutional*

In *Graham*, the United States Supreme Court held "the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender," but "does not require the State to release that offender during his natural life." (*Graham*, *supra*, 130 S.Ct. at p. 2030.) While "[t]hose who commit truly horrifying crimes as juveniles *may* turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives," the state may not "mak[e] the judgment at the outset that

---

sentence you to 200 years in state prison. After that you will be a free man. [¶] Defendant: But Judge, I cannot possibly serve out that sentence and win my freedom. [¶] Judge: Just do the best you can." (Mosk, *States' Rights — And Wrongs* (1997) 72 N.Y.U. L.Rev. 552, 558-559.)

those offenders never will be fit to reenter society."[4] (*Ibid.*, italics added.) We earlier reached a similar conclusion in this case, finding 14-year-old Nuñez's LWOP sentence for aggravated kidnapping violated article I, section 17, and the Eighth Amendment because the state, in prescribing LWOP (see § 209, subd. (a)), "ha[d] judged him irredeemable while at the same time extending hope of rehabilitation and parole to [older] juvenile kidnappers . . . who murder their victims." (*Nuñez*, *supra*, 173 Cal.App.4th at p. 733.) The logic of *Graham* extends this reasoning to all juvenile nonhomicide offenders, as we explain below.

The life sentence in *Graham* did not — by its terms — deny parole. Because Florida had abolished its parole system, the sentence amounted to life without the possibility of parole as a practical matter. The same is true of Nuñez's sentence here. The logic of *Graham* applies to a sentence like the one here, which amounts to life in prison without parole, though not expressly denominated an LWOP term.

In holding a state in advance may not constitutionally determine a youth will never reform sufficiently to be considered for release, *Graham* relied on precedent "establish[ing] that because juveniles have lessened culpability they are less deserving of the most severe punishments. [Citation.] As compared to adults, juveniles have a '"lack of maturity and an underdeveloped sense of responsibility"'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.' [Citation.] These salient characteristics mean

---

[4] In *Graham*, over the juvenile's request for the minimum five-year sentence and against the prosecutor's recommendation of 30 years for an armed burglary count and 15 years for attempted armed robbery, the trial court imposed a life sentence with no opportunity for parole, concluding community safety required denying the defendant any chance of later release because "'you have decided that this is the way you are going to live your life . . . .'" (*Graham*, *supra*, 130 S.Ct. at p. 2020.)

that ‘[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’ [Citation.] Accordingly, ‘juvenile offenders cannot with reliability be classified among the worst offenders.’ [Citation.] A juvenile is not absolved of responsibility for his actions, but his transgression ‘is not as morally reprehensible as that of an adult.’” (*Graham*, *supra*, 130 S.Ct. at p. 2026, citing *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*) and *Thompson v. Oklahoma* (1988) 487 U.S. 815; accord, *Nuñez*, *supra*, 173 Cal.App.4th at p. 726 [“Youth is generally relevant to culpability [citations], and the diminished ‘degree of danger’ [citation] a youth may present after years of incarceration has constitutional implications”].)

The high court concluded: “No recent data provide reason to reconsider the Court’s observations in *Roper* about the nature of juveniles. As petitioner’s *amici* point out, developments in psychology and brain science 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. [Citations.] Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults. [Citation.] It remains true that ‘[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.’” (*Graham*, *supra*, 130 S.Ct. at pp. 2026-2027.)

The court also considered that nonhomicide offenses are categorically different from murder. (*Graham*, *supra*, 130 S.Ct. at p. 2027 [“Serious nonhomicide crimes ‘may be devastating in their harm . . . but “in terms of moral depravity and of the injury to the person and to the public,” . . . they cannot be compared to murder in their

"severity and irrevocability"""].) Thus, when compared to an adult murderer, a juvenile offender has a "twice diminished moral culpability," based on his or her age and the nonfatal nature of the offense. (*Ibid.*; accord, *Nuñez*, *supra*, 173 Cal.App.4th at p. 727 ["youth so striking as petitioner's and the absence of injury or death to any victim" raised strong inference LWOP term was unconstitutional].)

In *Graham*, no penological justification outweighed the dispositive factors of the defendant's youth and the fact he did not commit a homicide. (*Graham*, *supra*, 130 S.Ct. at p. 2028 ["A sentence lacking any legitimate penologicial justification is by its nature disproportionate to the offense"].) The same was true of our analysis in *Nuñez* concerning the LWOP term imposed on Nuñez for aggravated kidnapping. (See *Nuñez*, *supra*, 173 Cal.App.4th at pp. 730-731 ["no valid penological purpose" to sentence given absence of "any measured relation to culpability"].)

"Valid penological goals include retribution, incapacitation, rehabilitation, and deterrence." (*Nuñez*, *supra*, 173 Cal.App.4th at p. 730.) Based on the diminished culpability of the young, the Supreme Court found in *Roper* that "[r]etribution is not proportional if the law's most severe penalty is imposed" on a juvenile who commits murder. (*Roper*, *supra*, 543 U.S. at p. 571.) *Graham* elaborated that "retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender." (*Graham*, *supra*, 130 S.Ct. at p. 2028.) *Graham* also held that "while incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide" because a sentencing authority's determination of permanent, irretrievable incorrigibility "'is inconsistent with youth.'" (*Id.* at p. 2029.)

Similarly, rehabilitation cannot be invoked to justify a sentence of lifetime incarceration, which "forswears altogether the rehabilitative ideal." (*Id.* at p. 2030.)

Finally, while denying juveniles any possibility of release may have a theoretical deterrent effect on their peers, its practical effect is likely slight since "'the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.'" (*Graham*, *supra*, 130 S.Ct. at p. 2028.) It is always the case that "the state *conceivably* may obtain an increased deterrent effect from grossly disproportionate punishment," but "the limiting principle of constitutional proportionality applies not only to retribution, but to incapacitation and deterrence." (*Nuñez*, *supra*, 173 Cal.App.4th at pp. 730-731, italics added; see *Graham*, at p. 2029 ["in light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence"].)

In sum, *Graham* held the sentencing practice of imposing life without parole on juvenile nonhomicide offenders "categorical[ly]" exceeded constitutional bounds (*Graham*, *supra*, 130 S.Ct. at pp. 2032-2033) based on two determinations: "the limited culpability of juvenile nonhomicide offenders" and the failure of any penological theory to rationally justify "the severity of life without parole sentences" (*id.* at p. 2030).

We conclude these principles apply here. A term of years effectively denying any possibility of parole is no less severe than an LWOP term. Removing the "LWOP" designation does not confer any greater penological justification. Nor does tinkering with the label somehow increase a juvenile's culpability. Finding a determinate sentence exceeding a juvenile's life expectancy constitutional because it is not labeled an LWOP sentence is Orwellian. Simply put, a distinction based on changing a label, as the trial court did, is arbitrary and baseless.

A distinction premised on the multiple offenses or victims that often underlie a de facto LWOP is also unpersuasive. The distinction finds no traction in *Graham*, given the juvenile there was a recidivist offender sentenced on multiple felonies, including separate instances of armed commercial burglary and home invasion robbery. In the burglary, the perpetrators struck the restaurant owner twice in the back of the head with a metal bar and, in the second incident, they held the homeowner at gunpoint. (*Graham*, *supra*, 130 S.Ct. at p. 2018.) Nevertheless, the de facto LWOP imposed there did not survive constitutional scrutiny, based on the lesser culpability of juveniles measured against the severity of a sentence denying any possibility of release. *Ramirez* does not acknowledge or discuss these principles, but instead ignores them, basing its rationale on an empty distinction between labels.

Our earlier opinion considered only the constitutionality of an LWOP sentence imposed for a single nonhomicide offense — aggravated kidnapping by a defendant under age 16. But here, aggregating for sentencing purposes the multiple offenses Nuñez committed as a 14 year old does not change the underlying constitutional principles. While the sum of his conduct is more serious because he committed multiple offenses, and he is accordingly more culpable than a defendant who commits only a single offense, under *Graham* his culpability remains diminished as a juvenile. Accordingly, no penological justification supports a permanent denial of parole consideration. Absent any penological rationale, the sentence the trial court imposed precluding any possibility of parole for 175 years is unconstitutional under the Eighth Amendment and article I, section 17 of our Constitution. (Cf. *Nuñez*, *supra*, 173 Cal.App.4th at pp. 730-731.)

As we observed above, whether a juvenile defendant will demonstrate reform and thus seize the opportunity an eventual chance at parole holds out, or instead will choose to perform poorly in prison, is speculative in any given case. The Supreme Court explained, moreover, that "[e]ven if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." (*Graham*, *supra*, 130 S.Ct. at p. 2029.) The same is true under article I, section 17. Thus, the federal and state Constitutions do not entitle a juvenile defendant to a "guarantee" of eventual freedom, but rather "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham*, at p. 2030.)

D. *California Precedent*

As noted at the outset, we are not the first California court to consider this issue. *Mendez* involved a 16 year old tried as an adult and convicted of carjacking, assault with a firearm, and seven counts of second-degree robbery, with street gang and firearm enhancements on each count. The defendant and his gang cohorts, including one only 15 years old, terrorized victims in an 80-minute armed spree ranging from Palmdale to West Hollywood. Carjacking netted the defendant a 25-years-to-life sentence, and imposition of consecutive sentences boosted the term to 84 years, which *Mendez* identified as a "de facto" LWOP or the functional "equivalent" of one, based on mortality tables. (*Mendez*, *supra*, 188 Cal.App.4th at p. 63, 68.) "[G]uided by the principles set forth in *Graham*," the *Mendez* court found the sentence violated constitutional bounds by

judging "at the outset" that the defendant could never be considered for parole. (*Id.* at p. 63.) The court also found the sentence grossly disproportionate as applied to the defendant independent of *Graham* and, because the record revealed little concerning the defendant's background and its impact on the question of consecutive or concurrent sentences, the court remanded for reconsideration of these issues. (*Id.* at pp. 64-68.)

In *Ramirez*, the court considered three consecutive indeterminate life terms imposed on a 16-year-old defendant convicted of attempted murder with street gang and firearm enhancements. (*Ramirez*, *supra*, 193 Cal.App.4th at p. ___ [2011 WL 893235, *1].) The trial court's sentence did not by its terms preclude parole, but the court's decision to impose consecutive sentences meant the juvenile's earliest parole date was 120 years in the future. (*Id.* at p. ___ [2011 WL 893235, *9 (dis. opn. of Manella, J.).) In a drive-by shooting, Ramirez had fired his revolver at three rival gang members walking near a restaurant, striking one and leaving him hospitalized for a month. Ramirez appeared to witnesses to be in his 20's; the driver of the car was 44 years old.

On appeal, the *Ramirez* majority recognized "there is language in *Graham* that suggests it may apply to individuals in appellant's situation," but concluded the United States Supreme Court limited its holding in *Graham* to cases in which an actual LWOP term is imposed. (*Ramirez*, *supra*, 193 Cal.App.4th at p. ___ [2011 WL 893235, *7].) *Ramirez* focused on a single sentence in *Graham*: "This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." (*Graham*, *supra*, 130 S.Ct. at p. 2030, cited in *Ramirez*, at p. ___ [2011 WL 893235, *7].) Narrowing *Graham* this way, *Ramirez* concluded the high court's opinion "did not apply to a juvenile offender who receives a term-of-years

sentence that results in the functional equivalent of a life sentence without the possibility of parole." (*Ramirez*, at p. ___ [2011 WL 893235, *7].)

Ramirez apparently viewed as a nonbinding caveat the portion of *Graham* stating that the Eighth Amendment "forbid[s] States from making the judgment at the outset that [juvenile nonhomicide] offenders never will be fit to reenter society." (*Graham*, *supra*, 130 S.Ct. at p. 2030.) We find the caveat employed by *Ramirez* unpersuasive. Imposing a term of years that exceeds a juvenile's life expectancy constitutes a judgment precluding parole at the outset no less than an LWOP. That the high court acknowledged juvenile offenders "*may* turn out to be irredeemable" and that the Eighth Amendment "does not foreclose the *possibility*" they will remain imprisoned for life is consistent with the requirement that they must receive an opportunity to obtain release. (*Graham*, at p. 2030, italics added.) Indeed, on the very page of *Graham* cited as controlling in *Ramirez*, the Supreme Court held states "must . . . give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham*, at p. 2030.) A juvenile who never seizes this opportunity will be denied release at an initial parole hearing and any that follow. Thus, the possibility of life imprisonment will become a reality, and dying in prison will identify those juvenile offenders who turned out to be irredeemable.

But *Graham*'s recognition that this outcome may occur does not mean it endorsed sentences precluding the possibility of parole, so long as they do not bear the LWOP label. Realistically, a term of years exceeding a juvenile's life expectancy bars parole by its own terms as definitively as an LWOP sentence, yet *Ramirez* draws a distinction between the two based on nomenclature. We disagree. *Ramirez*'s formalistic

reading frustrates *Graham*'s rationale.[5] Labels are not controlling. Rather, the role of the judiciary defined by the Constitution calls for "judicial exercise of independent judgment." (*Graham*, *supra*, 130 S.Ct. at p. 2026.) In our view, the rationale in *Graham* forbidding an advance judgment denying parole was more than a caveat.

E. *The Trial Court Erred in Imposing Consecutive Sentences*

Nuñez argues the foregoing constitutional principles demonstrate the trial court erred by imposing consecutive sentences for his primary offenses. Alternatively, he argues the trial court erred in applying consecutive sentencing criteria. (See Cal. Rules of Court, rule 4.425.) The trial court imposed consecutive sentences because Nuñez endangered multiple victims in "separate acts of violence or threats of violence." (Rule 4.425(a)(2).) But Nuñez contends his "crimes and their objectives" were not "predominantly independent of each other," which is a separate sentencing factor relevant to imposing consecutive sentences (rule 4.425(a)(1); see also rule 4.425(a)(3) [sentencing court must evaluate whether offenses reflected only "a single period of aberrant behavior"]). The criteria identified in the rules of court are not exclusive (rule 4.408(a)) and, in any event, must yield to constitutional considerations. Imposing consecutive sentences constitutes an abuse of discretion when the sentence exceeds constitutional bounds. (See, e.g., *People v. Keogh* (1975) 46 Cal.App.3d 919, 934-935 [consecutive sentences resulting in de facto life sentence violated California Constitution as cruel or unusual punishment for forgery].)

[5] Interpretation "without reference to purpose inferred from context is fallacious. Take that clearest of directives: 'Keep off the grass.' Read literally it forbids the groundskeeper to mow the grass. No one would read it literally." (*Marozsan v. United States* (7th Cir. 1988) 852 F.2d 1469, 1482 (conc. opn. of Posner, J.).)

Here, as noted, each of Nuñez's primary offenses and its associated firearm enhancement required a sentence in which he would not be eligible for parole for 35 years. Life expectancy at birth for children born in 1986 was 71.2 years for all males, 71.9 years for white males, and 64.8 years for black males. (National Center for Health Statistics, Centers for Disease Control and Prevention, National Vital Statistics Reports (May 20, 2010) table 8, vol. 58, No. 19 [available at www.cdc.gov/NCHS/data/nvsr/nvsr58/nvsr58_19.pdf (accessed on April 26, 2011)].) The trial court resentenced Nuñez in 2009 when he was 23 years old. Obviously, imposing two or more consecutive terms each prohibiting parole for 35 years far exceeded Nuñez's remaining life expectancy. Consequently, consecutive sentences on these offenses violate constitutional prohibitions.

Nuñez argues that because he did not commit murder, he cannot be sentenced to a term longer than the 25 years to life maximum for a juvenile his age who commits special circumstance murder. (*People v. Demirdjian* (2006) 144 Cal.App.4th 10, 17.) But Nuñez overlooks that the 25-year figure is the base term, without any enhancements. Using a firearm, especially personally discharging one as Nuñez did, and engaging in criminal activity for the benefit of a criminal street gang each warrant more severe punishment, and sentencing enhancements in these categories have survived constitutional challenge. (See, e.g., *People v. Em* (2009) 171 Cal.App.4th 964, 973-974.) In the present circumstances, the relevant constitutional metric is not the base term for a juvenile who commits murder without any enhancements, but whether the sentence imposed is tantamount to a life term without the possibility of parole. A sentence denying parole consideration for 35 years does not do that.

III

DISPOSITION

Nuñez's sentence is reversed because it violates the state and federal Constitutions by denying him a meaningful opportunity for release within his lifetime. His sentence of 175 years to life far exceeds the constitutional range. Accordingly, we direct the trial court to conduct a new sentencing hearing and to impose a new sentence consistent with this opinion.

ARONSON, J.

WE CONCUR:

O'LEARY, ACTING P. J.

IKOLA, J.