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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE ALFREDO RAMIREZ, Defendant and Appellant.	B220528 (Los Angeles County Super. Ct. No. BA330274)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed as modified and remanded with directions.

Carlo A. Spiga and Grace E. Ayers for Defendant and Appellant.

Kamala Harris and Edmund G. Brown, Jr., Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jose Alfredo Ramirez appeals from the judgment entered following his conviction by jury of three counts of attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664/187),[1] with the finding that he personally discharged a firearm which caused great bodily injury to one of the victims (§ 12022.53, subd. (d)). The jury also concluded appellant committed the crimes with the intent to benefit a criminal street gang. (§ 186.22, subd. (b)(1)(C).) Appellant was sentenced to three consecutive life terms for the attempted murders (he must serve a minimum of 15 calendar years for each term before becoming eligible for parole) and three consecutive 25 year-to-life terms for the firearm enhancement. He appeals, contending trial counsel rendered ineffective assistance, the court erred in permitting the preliminary testimony of a witness to be read to the jury, and his sentence constitutes cruel and unusual punishment. Respondent contends the abstract of judgment fails to accurately reflect the court's imposition of certain fees. We conclude the abstract of judgment must be corrected, and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Prosecution Case

The three victims, Leonel "Leo" Riera, Shaday "Shady" Martinez, and Jeremy Salazar, members or former member of the City Terrace gang, were fired on while walking near the corner of Ramona Boulevard and Eastern Avenue in Los Angeles on August 18, 2007, at approximately 3:30 p.m. One shot hit Riera in the face, hospitalizing him for a month and leaving him with missing and broken teeth and scars. The shooting occurred near a number of fast food restaurants in an area claimed by City Terrace. The victims were unable or unwilling to identify their assailants.

Three eyewitnesses—Arturo Ochoa, Elizabeth Diaz, and her young son Christopher Lujan—testified that they heard five or six shots that appeared to have been fired from a green car occupied by two Hispanic males. The driver was not wearing a

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

shirt and was somewhat older than the passenger who appeared to be in his 20's. None of these witnesses could positively identify the men, although Diaz identified appellant in a photographic lineup as looking similar to one of them.[2]

Thirty to 45 minutes prior to the shooting, Deputy Goro Yoshida and his partner stopped a green car not far from where the shooting occurred. Geraghty Lomas gang member Arthur "Arty" Romero was driving; fellow gang member Garai "Bugzy" Bilbao was with him. Romero was not wearing a shirt. The deputies had searched the men and the car and found no weapons or any reason to detain them.

After the shooting, Romero was questioned multiple times and ultimately arrested for the crime. He entered into a plea agreement, agreeing to testify to what happened and to provide information about other crimes in return for a prison term of 7 to 14 years. At trial, Romero, who was 44, confirmed that he had been a long time member of Geraghty Lomas. He said that members of the gang considered City Terrace to be their primary rival. He testified that prior to the shooting he had been driving in the neighborhood with Bugzy Bilbao, when they were stopped by deputies.[3] Shortly after the stop, Romero dropped Bilbao off at the home of another Geraghty Lomas member, Manuel "Topo" Alguin. Romero, a drug addict, left to buy heroin. When he returned, he saw appellant, whom he called "Gallo," and another gang member, Bobby Encinas, leaving in Encinas's car. Romero followed them in the green car. A short distance away, appellant got out of Encinas's car and called to Romero to pull over. He asked Romero to drive him to a fast food restaurant near the corner of Ramona and Eastern, in City Terrace territory. As they neared their destination, appellant showed Romero a gun and said, "I hope we get lucky." They spotted three males who appeared to be gang members. Romero stopped the car and appellant started shooting. As he fired, appellant said, "puro Geraghty."

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[2] Diaz saw the driver leaning over the passenger in a way that caused her to believe he might be the shooter. Lujan identified another gang member—Garai "Bugzy" Bilbao—as someone who looked similarly shaped to one of the men.

[3] Romero described the car's color as turquoise.

When contacted by detectives, Romero initially told them that another Geraghty Lomas member—Eric Gonzalez—had told him appellant was the shooter; he did not admit to any personal knowledge of the crime. After being confronted with a tape of a conversation between appellant and an imprisoned gang member, Romero admitted being the driver for appellant. In pretrial interviews with detectives, he said that he was aware appellant had a gun before appellant got in the car.

The prosecution was unable to secure the presence of Eric Gonzalez at trial.[4] Accordingly, his preliminary hearing testimony was read to the jury. At the preliminary hearing, Gonzalez denied being a member of Geraghty Lomas or having any information about the gang, the shooting or appellant's possible involvement. He further testified that he did not remember speaking to detectives or telling them about the events surrounding the shooting. Gonzalez was cross-examined during the hearing. He specifically denied telling detectives that he heard Geraghty Lomas gang member Jorge "Gato" Flores say, "Let's go get them," that he saw appellant leave with "Smiley," "Scarface," or another individual in a white Expedition, or that when appellant and these individuals returned, they took Gonzalez to a location where they said a shooting had occurred, but Gonzalez saw no ambulance, police, or other activity. He also denied telling detectives that the gun he saw appellant holding was an automatic.

After this testimony was read, the prosecution called Detective Eduardo Aguirre. Detective Aguirre testified that he interviewed Gonzalez in September 2007, shortly after the shooting, and that the interview was recorded. Gonzalez told Detective Aguirre that he was a member of Geraghty Lomas, nicknamed "Sneaks." On the day of the shooting, a group of Geraghty Lomas members, including appellant and Romero, met at the home of Topo Alguin and discussed the need to "put in work" for the gang. Romero and appellant did most of the talking. Gonzalez and another gang member went out to get a snack and saw two City Terrace gang members, "Travi" and "Menace." They reported this information back to the Geraghty Lomas members. Flores (Gato) or appellant

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[4] The facts related to the prosecution's attempt to locate and subpoena Gonzalez are discussed further below.

(Gallo) said, "Let's go get them." Appellant left briefly and returned with a gun. Romero was there when appellant displayed the gun. Gonzalez saw appellant, a gang member nicknamed "Scarface," and another man leave in a small gray car; Romero left separately in a green car. When appellant, Scarface, and the other man returned, Romero was not with them. Appellant bragged about shooting "Menace." Gonzalez was taken by appellant, "Smiley," and another man in a white Expedition to a Burger King restaurant at Ramona and Eastern. Appellant described the shooting that had allegedly occurred a short time earlier, but there was no visible evidence of a shooting.

The prosecution played a recorded telephone conversation between appellant and Primitivo "Little Malo" Tapia, which occurred when Tapia was imprisoned for an unrelated offense.[5] During the conversation, the following exchange occurred: Appellant: "You, you already know what happened to the main enemies?" Tapia: "The, the City Terrace?" Appellant: "Yeah, you know what happened?" Tapia: "What?" Appellant: "[Clears throat] The, the . . . [t]wo guys I got." Tapia: "Nah." Appellant: "[Unintelligible.] [Laughs.]" Tapia: "Hey!" Appellant: "Huh?" Tapia: "Where?" Appellant: "Over there at the Burger King." Tapia: "How many?" Appellant: "Two." Tapia: "Oh really?" Appellant: "Yeah."

Deputy Yoshida arrived at the scene after the shooting. He observed bullet holes in buildings and found a number of bullet fragments. He found no shell casings, indicating that a revolver was used in the shooting. Detectives later searched appellant's family's home and uncovered multiple boxes of ammunition, including bullets of various calibers and shotgun shells.

II. The Defense Case

The defense called multiple witnesses—appellant's father, Jose Ramirez, neighbor Samuel Mendez, and tenants Candido Barrales, Eloina Rojas, and Martin Alejo. They all

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[5] The call had been made by Tapia to the residence of "Gato" (Flores), but the speaker identified himself as "Gallo" (appellant's nickname), and Detective Aguirre testified that he recognized appellant's voice on the tape.

testified that on the day of the shooting, appellant was helping his father repair rental units by painting a room and repairing a fence, and that he was in their presence until early evening.

DISCUSSION

I. Ineffective Assistance of Counsel

During the cross-examination of Detective Aguirre, defense counsel elicited testimony that the detective had listened to a number of taped telephone calls made by Tapia from prison, in addition to the one with appellant introduced by the prosecution. Counsel apparently had before him an affidavit for a search warrant in which Detective Aguirre had said that "Gato" had admitted in one such conversation shooting "three members of trash." Over the prosecutor's objection, defense counsel sought to have the information about Gato's statement put before the jury through Detective Aguirre's testimony. During a bench conference, counsel indicated that he had asked the detective about the statement previously and that the detective had said "yeah, [I] heard it." The prosecutor commented: "I think what the warrant says is something to the effect that Gato says, '*We* got three trash at the Burger King,' which could very well mean the gang, not him personally." (Italics added.) The court pointed out that although the hearsay statement appeared to be a declaration against penal interest, there had been no showing of the speaker's unavailability. The court asked what efforts had been made to subpoena "Gato." Defense counsel did not respond. The court ruled that the evidence was inadmissible. The matter did not arise again, and the jury was never informed of the tape or its contents. Appellant, relying solely on this interchange, contends that trial counsel was incompetent.

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel. [Citations.] The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its

result. [Citations.] [¶] Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to effective assistance. [Citations.] Specifically, it entitles him to 'the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 215, quoting *United States v. De Coster* (D.C.Cir. 1973) 487 F.2d 1197, 1202.) In order to establish ineffective assistance of counsel sufficient to overturn a conviction, the defendant must show: "(1) deficient performance under an objective standard of professional reasonableness and (2) prejudice under a test of reasonable probability of an adverse effect on the outcome. [Citation.]" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. omitted, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Appellant contends that defense counsel was incompetent for failing to investigate Gato's alleged statement that he "'got'" the "'three trash at the Burger King.'" He contends that counsel should have located and interviewed Gato and, if possible, secured his testimony at trial. We conclude that the current record does not support the contention that trial counsel was deficient.

There can be no dispute that defense counsel may be deemed incompetent for failing to adequately investigate when he or she receives a promising lead, particularly where it involves information suggesting someone other than the defendant committed the charged crime. (See, e.g., *In re Thomas* (2006) 37 Cal.4th 1249, 1262, quoting 1 ABA Stds. for Crim. Justice (2d ed. 1982 supp.) std. 4-4.1 [finding counsel incompetent for failing to investigate witness's statement that she saw another man arguing with victims shortly before their deaths]; *People v. Bess* (1984) 153 Cal.App.3d 1053, 1060 [concluding counsel's failure to interview witnesses who supported defendant's innocence was unreasonable].) However, where a defendant alleges incompetent investigation or presentation of evidence by trial counsel, he or she must demonstrate that the overlooked evidence would have been exculpatory in some fashion. (*In re Noday* (1981) 125 Cal.App.3d 507, 522.) Put another way, the defendant "must show us what the trial would have been like, had he been competently represented, so we can compare

that with the trial that actually occurred and determine whether it is reasonably probable that the result would have been different." (*In re Fields* (1990) 51 Cal.3d 1063, 1071; accord, *In re Hardy* (2007) 41 Cal.4th 977, 1025.) In addition, the defendant must establish that counsel's actions were not based on a strategic decision. (See *In re Thomas*, *supra*, 37 Cal.4th at p. 1264, fn. 4 [explaining that "not . . . every decision to curtail investigation in an area based on the improbability of finding evidence is ineffective assistance" and that generally "it is for counsel to decide what leads are or are not worth exploring"].) "'"[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.'" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266, quoting *People v. Wilson* (1992) 3 Cal.4th 926, 936.)

Here, the record is not only silent as to the reasons for counsel's actions, it is not clear that there was a promising lead requiring further investigation or, if there was, that counsel failed to investigate it. Defense counsel described Gato's statement as claiming personal credit for "getting" the rival gang members, but the prosecutor stated that Gato used the words "we got," indicating he was referring to a crime committed by the gang, rather than by him personally. We cannot resolve this dispute as neither the transcript of the conversation nor the detective's affidavit describing it is in our record. Moreover, there is nothing in the record to indicate that counsel failed to contact or interview Gato when he received the information.[6] Finally, assuming counsel did not contact Gato or having done so, made the decision to refrain from calling him to testify, the decision may have been made for strategic reasons based on all the information known to counsel. "'To sustain a claim of inadequate representation by reason of failure to call a witness, there must be a showing from which it can be determined whether the testimony of the alleged additional defense witness was material, necessary, or admissible, or that defense

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[6] In his brief, appellant states that defense counsel "made no *apparent* effort to contact, investigate, or seek testimony" from Gato, citing the interchange at trial. (Italics added.) At trial, counsel did not state whether he sought further information from Gato.

counsel did not exercise proper judgment in failing to call him.'" (*In re Noday*, *supra*, 125 Cal.App.3d at p. 522, quoting *People v. Hill* (1969) 70 Cal.2d 678, 690-691.) Where the record is silent as to the reasons for particular actions of trial counsel, an appeal is not the proper vehicle for determining competency. (*People v. Bess*, *supra*, 153 Cal.App.3d at p. 1059; *People v. Mendoza Tello*, *supra*, 15 Cal.4th at pp. 266-267 ["A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding."].) In short, the record before us does not support appellant's claim of ineffective assistance of counsel.

II. Unavailability of Gonzalez

As discussed, Gonzalez was not present at trial. His preliminary hearing testimony was read to the jury over appellant's objection. Before admitting the prior testimony, the court held a hearing to determine whether the prosecutor exerted due diligence to obtain Gonzalez's presence at trial. Appellant contends the court erred in concluding that adequate efforts had been made.

The evidence presented at the due diligence hearing established that securing Gonzalez's presence at the preliminary hearing had been difficult, as neither he nor his mother wanted him to testify.[7] Both expressed anger and fear to Detective Aguirre, who had been tasked with keeping track of Gonzalez and securing his presence in court. On one occasion, when Detective Aguirre attempted to serve Gonzales, he refused to take the subpoena. For a period, the court placed Gonzales in custody to ensure he would appear. By the time of the preliminary hearing, he was not in custody. He appeared at the hearing after the court issued a body attachment.

Between the preliminary hearing and the trial, Detective Aguirre attempted to keep track of Gonzalez by visiting his neighborhood and school. During this period, he occasionally saw Gonzalez. On August 20, 2009, approximately 14 months after the

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[7] Gonzalez was 14 at the time of the hearing.

preliminary hearing and one month before trial,[8] Detective Aguirre appeared at Gonzalez's home and was told by Gonzalez's grandmother that Gonzalez and his mother had moved several months earlier and were living in Crocket, Texas. The detective confirmed with Gonzalez's school that he was no longer enrolled and checked to determine if he was in custody or had died. The detective also checked social services to determine whether Gonzalez or his mother were receiving aid of any kind and law enforcement records to determine whether he was wanted in any jurisdiction. All these searches were negative. On September 3, Detective Aguirre returned to the last known address where he had previously spoken to Gonzalez's grandmother. A man identifying himself as Gonzalez's uncle accused the detective of "bringing heat" to the family and said that because of his prior visit, the grandmother had moved as well.

On September 7, Detective Aguirre through "departmental resources" and the district attorney's office acquired a specific address for Gonzalez's mother in Longview, Texas. On September 11, he contacted the Longview Police Department, which sent an officer to the address. The officer spoke with Gonzalez's mother. She told the officer that Gonzalez was not home. The officer obtained her cell phone number. Detective Aguirre called the number and left messages, but none were ever returned. On the day of the due diligence hearing (September 15), the prosecutor reported that he had faxed a subpoena to the office of the district attorney for the Texas county where the address was located. An investigator went to the address and made an attempt to contact the family to serve the subpoena, but no one answered the door.

Evidence Code section 1291, subdivision (a)(2) provides that former testimony is not rendered inadmissible by the hearsay rule if (1) "the declarant is unavailable as a witness" and (2) "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." Under Evidence Code section 240, subdivision (a)(5), a witness is unavailable when he or she is "[a]bsent from the hearing and the proponent of

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[8] Jury selection began September 17, 2009.

his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process."

"The term '[r]easonable diligence, often called "due diligence" in case law, "'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.'"'" (*People v. Herrera* (2010) 49 Cal.4th 613, 622, quoting *People v. Cogswell* (2010) 48 Cal.4th 467, 477.) To establish due diligence and unavailability, "the prosecution must show that its efforts to locate and produce a witness for trial were reasonable under the circumstances presented." (*People v. Herrera*, *supra*, at p. 623.) "Considerations relevant to the due diligence inquiry 'include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.'" (*Id*. at p. 622, quoting *People v. Wilson* (2005) 36 Cal.4th 309, 341.) "The prosecution is not required 'to keep "periodic tabs" on every material witness in a criminal case.'" (*People v. Wilson*, *supra*, 36 Cal.4th at p. 342, quoting *People v. Hovey* (1988) 44 Cal.3d 543, 564.) Moreover, the prosecution is not required, "absent knowledge of a 'substantial risk that [an] important witness would flee,'" to take preventative measures to stop a witness from disappearing. (*Wilson*, *supra*, at p. 342.)

Appellate courts "review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard [citation], and independently review whether the facts demonstrate prosecutorial good faith and due diligence [citation]." (*People v. Herrera*, *supra*, 49 Cal.4th at p. 622.) Here, the facts are not in dispute, and our independent analysis convinces us that the prosecution acted in good faith and with due diligence to secure Gonzalez's presence at trial. The prosecutor was on notice of Gonzalez's reluctance to testify. However, there was nothing to suggest that he would flee the area in which his home, school, and family were located. Given the circumstances, the prosecutor's conduct was reasonable. Detective Aguirre kept tabs on Gonzalez following the preliminary hearing and attempted to contact him to secure his presence. The detective timed his attempt so that it occurred in advance of trial, but not so far in advance as to encourage him to formulate a plan of escape. (Cf. *People v. Diaz*

(2002) 95 Cal.App.4th 695, 707 [in finding due diligence, court credited gang officer's testimony that based on his experience and specific knowledge of the witness, giving advance warning by serving a subpoena prior to trial, "would merely ensure that she would leave the area [on the day of trial] to avoid testifying"].) When Detective Aguirre learned that Gonzalez had unexpectedly left the state, the detective was diligent in locating him and attempting to secure his cooperation. Thereafter, the prosecutor was diligent in attempting to have him subpoenaed by out-of-state authorities. That all these efforts failed is not indicative of a lack of diligence but of the witness's determination and calculated effort, supported by his family, to avoid testifying.

Citing *People v. Cromer* (2001) 24 Cal.4th 889, appellant contends that allowing 14 months to elapse before trying to contact Gonzalez was unreasonable. In *Cromer*, the prosecutor learned within two weeks of a June preliminary hearing that a key witness had disappeared, but made no attempt to locate her until December. After receiving promising information that the witness was living in San Bernardino with her mother, the prosecutor made only a single effort to find the witness or speak with her mother. In its independent evaluation of the facts, the Court of Appeal found this did not represent reasonable diligence, and the Supreme Court affirmed. (*Id.* at pp. 904-905.) Here, in contrast, the witness did not leave the area until a few months before trial, and the prosecutor had no reason to believe he would leave or knowledge that he had left until Detective Aguirre spoke with the grandmother in August. Once the prosecutor learned of the boy's disappearance, diligent efforts were made to locate him, and he was located. Unfortunately, by that time, it was too late to secure the presence of the recalcitrant witness.[9]

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[9] Appellant contends that more diligent efforts to secure Gonzalez's presence were necessary because he was a "key" witness, "central[]" to the prosecution's case. We find no basis to assume that had Gonzalez appeared, he would have done anything other than repeat his performance at the preliminary hearing, denying all knowledge of Geraghty Lomas, the shooting, or appellant. Defense counsel had already cross-examined Gonzalez at the hearing and attempted to persuade him to repeat those portions of the statement to the detectives that were helpful to appellant—that Gato Flores, not appellant, had said, "Let's go get them"; that he never saw appellant in the green car; that he never

III. Constitutionality of Appellant's Sentence

Relying on the United States Supreme Court's decision in *Graham v. Florida* (2010) 560 U.S. ___ [130 S.Ct. 2011, 176 L.Ed.2d 825] (*Graham*), which held that a juvenile offender may not be sentenced to life without the possibility of parole, appellant contends his sentence is unconstitutional. He reasons that his sentence of 120 years to life will not be completed within his lifetime and asserts *Graham* requires that he be given a "'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'" (quoting *Graham*, *supra*, 560 U.S. at p. ___ [130 S.Ct. at p. 2030]).

In *People v. Caballero* (2011) 191 Cal.App.4th 1248, a panel of this division noted that the *Graham* court limited the scope of its decision. "The court defined the class of offenders with which it was dealing thusly: 'The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.'" (*Id*. at p. 1255, quoting *Graham*, *supra*, 560 U.S. at p. ___ [130 S.Ct. at p. 2023].) While we recognize there is language in *Graham* that suggests it may apply to individuals in appellant's situation, the court stated its holding quite clearly: "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*, 560 U.S. at p. ___ [130 S.Ct. at p. 2030].) Thus, we concluded in *Caballero* that *Graham* 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. (*People v. Caballero*, *supra*, 191 Cal.App.4th at pp. 1255-1256.) We adhere to that view.

IV. Error in Abstract of Judgment

At the time of appellant's conviction, section 1465.8 provided that, "[t]o ensure and maintain adequate funding for court security, a fee of thirty dollars ($30) shall be

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saw Romero and appellant together; that the gun appellant displayed was an automatic; and that although appellant bragged about committing a shooting, the location to which Gonzalez was taken showed no signs of a prior shooting.

imposed on every conviction for a criminal offense." In addition, Government Code section 70373 provided: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense . . . in the amount of $30 ($30) for each misdemeanor or felony . . . ." At the sentencing hearing, the court stated it was imposing a "security fine" for each count in the amount of $30 and a "construction fine" in the amount of $30. However, although the minute order reflected imposition of a security assessment for count one pursuant to section 1465.8, subdivision (a)(1), the amount set forth was only $20. In addition, there was no mention in the minute order's recitation of the punishment imposed for count one of the construction fine imposed by the court.[10] The abstract of judgment, following the minute order, stated that appellant was to pay an $80 fee under section 1465.8 and a $60 assessment under Government Code section 70373. This was a mistake. The court's oral judgment and the applicable statutes required imposition of a $90 security fee ($30 for each count) and a $90 facility assessment ($30 for each count).

The reporter's transcript, not the minute order, sets forth the court's judgment and an appellate court may order the abstract of judgment modified to reflect the proper judgment. (See, e.g., *People v. Lopez* (2010) 188 Cal.App.4th 474, 480; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1328; see *People v. Mitchell* (2001) 26 Cal.4th 181, 185 ["It is, of course, important that courts correct errors and omissions in abstracts of judgment. An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize."].) Accordingly, we order the abstract of judgment modified to increase the court security fee imposed under section 1465.8 to $90 and the assessment imposed pursuant to Government Code section 70373 to $90.

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[10] Under counts two and three, the minute order correctly stated the security assessment under section 1465.8, subdivision (a)(1) was $30. In addition, the minute order stated that the court had imposed "criminal conviction assessment[s]" pursuant to Government Code section 70373 of $30 under counts two and three.

DISPOSITION

The judgment is affirmed. The clerk of the superior court is directed upon issuance of the remittitur to prepare a corrected abstract of judgment (1) increasing the court security fee imposed under section 1465.8 to $90, and (2) increasing the assessment imposed pursuant to Government Code section 70373 to $90. The clerk is directed to forward the corrected abstract to the Department of Corrections and Rehabilitation.

CERTIFIED FOR PUBLICATION

SUZUKAWA, J.

I concur:

WILLHITE, Acting P.J.

Manella, J., Dissenting in part:

I concur in parts I, II and IV of the Discussion in the majority opinion. I respectfully dissent to part III because I believe the United States Supreme Court's decision in *Graham v. Florida* (2010) __ U.S. __ [130 S.Ct. 2011, 2034] (*Graham*), prohibiting "imposition of a life without parole sentence on a juvenile offender who did not commit homicide," requires remand for resentencing.

A. *Term of Years Sentence*

The majority follows *People v. Caballero* (2011) 191 Cal.App.4th 1248 (*Caballero*), in which a panel of this court rejected the defendant's contention that *Graham* applied to a juvenile sentenced to a term of years that, like appellant's, exceeded his life expectancy. I believe *Caballero* gave an overly literal interpretation to the term "life without parole sentence" which conflicts with *Graham's* rationale.

In *Caballero*, the court concluded that *Graham* applied only to juveniles convicted of a nonhomicide offense who were sentenced to "life . . . without the possibility of parole."[1] (*Caballero, supra,* 191 Cal.App.4th at p. 1255.) The sentence imposed in *Graham* was not, literally, such a sentence. The defendant was sentenced to "life imprisonment" which, effectively, became life without parole as Florida had abolished its parole system. (*Graham*, *supra*, 130 S.Ct. at p. 2020.) Appellant's 120-year sentence is, for all intents and purposes, the same as that at issue in *Graham*. He has been sentenced to a term which deprives him of any meaningful opportunity for parole. The parties agree that the date on which he will first become eligible for parole -- more than a century from now -- is far beyond his life expectancy. (See National Center for Health Statistics,

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1 The panel also declined to follow the holding in *People v. Mendez* (2010) 188 Cal.App.4th 47, 63-64. There, Division Two held that although a sentence of 84 years to life was "not technically an LWOP sentence" and thus not "controlled" by *Graham*, the Supreme Court's decision requires the state to give a juvenile "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,'" and forbids a sentencing judge from concluding at the outset that the juvenile "should be separated from society for the duration of his life."

Centers for Disease Control, National Vital Statistics Reports (June 28, 2010) table 2, vol. 58, No. 21 [average 17 to 18 year old male has life expectancy of additional 59.0 years]; *People v. Mendez*, *supra*, 188 Cal.App.4th at p. 63 [life expectancy for 18-year old American male is 76 years].) He has thus effectively been sentenced to "life without parole" – a sentence *Graham* prohibits for juvenile nonhomicide offenders.

The Supreme Court's intention that its holding in *Graham* be applied to any sentence which results in a juvenile nonhomicide offender dying of old age in prison without hope of release is inherent in the rationale given to support the decision. Graham had been sentenced to life in prison plus 15 years for participating in a burglary, assault and attempted armed robbery when he was 16. The issue presented was whether "the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime." (*Graham, supra,* 130 S.Ct. at p. 2017.) Finding that the issue "implicate[d] a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes," the Supreme Court concluded that the case raised "a categorical challenge" to the punishment imposed, a type of challenge that had previously been successful only in cases involving capital punishment. (*Id*. at pp. 2022-2023; see, e.g., *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*) [court adopted categorical rule prohibiting death penalty for juveniles]; *Atkins v. Virginia* (2002) 536 U.S. 304 [court adopted categorical rule prohibiting death penalty for defendants with low intellectual function].) The court acknowledged that the case presented an issue "not considered previously" -- "a categorical challenge to a term-of-years sentence." (*Graham*, *supra*, at p. 2022.)

The court was persuaded by multiple factors to conclude that states are prohibited from imposing "a life without parole sentence on a juvenile offender who did not commit homicide" and are required to give juvenile nonhomicide offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham*, *supra*, 130 S.Ct. at pp. 2030, 2034.) First, the court found support in the "'objective indicia of society's standards, as expressed in legislative enactments and state practice.'" (*Id*. at p. 2022, quoting *Roper*, *supra*, 543 U.S. at p. 563.) According to the

court, although 37 states, the District of Columbia and federal law permit sentences of life without parole to be imposed on juvenile offenders, "only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders . . . while 26 States as well as the District of Columbia do not impose them despite apparent statutory authorization." (*Graham*, *supra*, at p. 2024.) The court thus found that "in proportion to the opportunities for its imposition, life without parole sentences of juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual." (*Id*. at p. 2025.)

The court next considered "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." Citing its findings in *Roper*, the court explained that "[a]s 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.'" (*Graham*, *supra*, 130 S.Ct. at p. 2026, quoting *Roper*, *supra*, 543 U.S. at pp. 569-570.) "These salient characteristics mean 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.'" (*Graham*, *supra,* at p. 2026, quoting *Roper*, *supra,* at pp. 569, 573.)

Nor, the court found, could nonhomicide crimes "be compared to murder in their 'severity and irrevocability.'" (*Graham, supra*, 130 S.Ct. at p. 2027, quoting *Kennedy v. Louisiana* (2008) 554 U.S. 407, 438.) Considering the penalty at issue, the court noted that life without parole is second in severity only to the death sentence, and "share[s] some characteristics with death sentences" in that it "alters the offender's life by a forfeiture that is irrevocable" and "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency." (*Ibid.*)[2]

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[2] The court observed that it had previously emphasized the significance of the possibility of release in evaluating Eighth Amendment challenges. In *Rummel v. Estelle*

At the same time, the court found penological justifications for such lengthy incarceration lacking. Neither retribution, deterrence nor incapacitation could justify imposing "the second most severe penalty on the less culpable juvenile nonhomicide offender" because such a sentence "improperly denies the juvenile offender a chance to demonstrate growth and maturity." (*Graham, supra*, 130 S.Ct. at pp. 2028, 2029.) "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." (*Id.* at p. 2029.) As the court emphasized, it was the state's decision "at the outset" that a youthful offender was incorrigible that rendered the sentence disproportionate: "A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." (*Ibid.*) Finally, the court noted that a sentence of life without parole "forswears altogether" the penological goal of rehabilitation: "By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability." (*Id.* at p. 2030.)

The court emphasized that a state was not required to guarantee eventual release to all juveniles convicted of a nonhomicide offense. "What the State must do, however, is give [such] defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham, supra*, 130 S.Ct. at p. 2030.)

(1980) 445 U.S. 263, the court upheld a defendant's sentence of life imprisonment for his third nonviolent felony, noting that in light of the possibility of parole, any analysis of the petitioner's sentence "'could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life.' [*Rummel, supra*,] at pp. 280-281." (*Graham, supra*, 130 S.Ct. at p. 2027.) In contrast, the court's decision in *Solem v. Helm* (1983) 463 U.S. 277, striking down a sentence of life without parole for a defendant convicted of his seventh nonviolent felony, noted that the sentence was "'far more severe than the life sentence we considered in *Rummel,*' because it did not give the defendant the possibility of parole." (*Graham, supra*, at p. 2028, quoting *Solem, supra,* at p. 297.) Appellant's possibility of parole is no better than that of the defendants in *Graham* and *Solem.*

Acknowledging that "[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 court stressed that "[t]he Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. *It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society."* (*Ibid.*, italics added.)

The import of *Graham's* holding is both implicit and explicit: juveniles are works in progress, more malleable and less formed, more capable of change and development, and less morally responsible than adults; those convicted of nonhomicide offenses are demonstrably less culpable than those convicted of taking a life; they may not be "written off" at the time of sentencing as incapable of ever becoming sufficiently responsible to be released from custody; and because life in prison without the possibility of parole "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, [and] no hope," it violates the Eighth Amendment. (*Graham, supra*, 130 S.Ct. at p. 2032.)

The rationale for the court's formulation of a categorical rule prohibiting imposition of life imprisonment without parole for juveniles convicted of nonhomicide offenses applies here. Appellant's crimes, admittedly brutal, were planned and committed when he was 16 years old and represent the actions of a few hours on a single day of his young life. The sentence imposed reflects the assumption that appellant is incorrigible, is without the capacity for change, and will never be fit to reenter society. The forecast was made at the outset, well before appellant has had an opportunity to achieve maturity or demonstrate his capacity for reform. The sentence of over 100 years, as surely as Terrance Graham's sentence of life imprisonment, "guarantees he will die in prison without any meaningful opportunity to obtain release," no matter what he might do to demonstrate his changed character. (*Graham, supra*, 130 S.Ct. at p. 2033.) Like Terrance Graham, appellant has been denied "any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law." This, according to the Supreme Court, "the Eighth

Amendment does not permit." I believe we are bound to follow the Supreme Court's determination that imposition of such a sentence is constitutionally infirm.

B. *Attempted Murder as a Nonhomicide Offense*

The majority does not reach the alternate contention raised by respondent that *Graham* does not apply here because the crimes committed by appellant -- attempted, willful, deliberate premeditated murder -- do not fall within the definition of "nonhomicide" crime. This contention raises a difficult issue because the opinion in *Graham* is less than clear. In concluding that the number of juvenile offenders convicted of nonhomicide offenses was exceedingly rare, the court relied in part on a study which, in tabulating the numbers of juveniles imprisoned for life without parole, defined "non-homicide" *not* to include convictions for murder *or attempted murder* (see Annino et al., *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation* (Updated Sept. 14, 2009) Public Interest Law Center, College of Law, Fla. State Univ., p. 4). Moreover, in its discussion of the lessened moral culpability of juvenile offenders, the court twice referred to the lessened culpability of defendants who do not kill "or intend to kill" (*Graham, supra*, 130 S.Ct. at p. 2027). Finally, in its discussion of global consensus, the court referred to Israel as a country that does not impose the sentence of life without parole for nonhomicide crimes based on the fact that "all of the seven Israeli prisoners whom commentators have identified as serving life sentences for juvenile crimes were convicted of homicide *or attempted homicide*" (*id*. at p. 2033, italics added).

Nevertheless, I believe the Supreme Court intended its categorical rule to apply to juveniles convicted of attempted murder. I base this conclusion primarily on the language the court twice chose to express its holding: (1) "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, italics omitted); (2) "The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." (*Id.* at p. 2034.) While the definition of "nonhomicide" may be subject to debate, the word "homicide" has a specific meaning

that requires the taking of a human life. (See 1Witkin & Epstein, Criminal Law (3d ed. 2000) Crimes Against the Person, § 91, p. 707 [homicide connotes death of individual at hands of another].)

I further rely on the court's discussion of the "line 'between homicide and other serious violent offenses against the individual.'" (*Graham*, *supra*, 130 S.Ct. at p. 2027.) Noting that "[s]erious nonhomicide crimes 'may be devastating in their harm,'" the court nonetheless observed that ""“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"”" because "'[l]ife is over for the victim of the murder,' but for the victim of even a very serious nonhomicide crime, 'life . . . is not over and normally is not beyond repair.'" (*Ibid.*) In making this distinction, the court relied on *Kennedy v. Louisiana, supra,* 554 U.S. 407, in which it held that capital punishment may not be imposed for a crime that does not result in death, even a crime as heinous as child rape. If *Graham* applies to a juvenile child rapist -- as it clearly does -- there is no rational basis for declining to apply it to someone like appellant, who attempted but failed to kill, and whose victims walked into court to testify.[3]

MANELLA, J.

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[3] My conclusion is in accord with that of the Florida appellate court in *Manuel v. State* (Fla.Dist.Ct.App. 2010) 48 So.3d 94, in which the State of Florida similarly argued that *Graham* did not apply because the defendant's convictions for attempted murder should be considered homicide offenses. (*Manuel v. State, supra,* at p. 97.) The court, concluding otherwise, observed that "under the definition of homicide, '[i]t is necessary for the act to result in the death of a human being'" (*ibid.*, quoting *Tipton v. State* (Fla. 1957) 97 So.2d 277, 281), and that "simple logic dictates that attempted murder is a nonhomicide offense because death, by definition, has not occurred." (*Manuel v. State*, at p. 97.)