No. S277487

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TONY HARDIN,

Defendants and Respondents,

APPLICATION TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF OF PROSECUTORS ALLIANCE OF CALIFORNIA IN SUPPORT OF NEITHER PARTY

After a Decision by the Court of Appeal,
Second Appellate District, Division Seven, No. B315434
Los Angeles County Superior Court, No. A893110
The Hon. Juan Carlos Dominguez

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APPLICATION TO FILE AMICUS CURIAE BRIEF

Under rule 8.520(f) of the California Rules of Court, the Prosecutors Alliance of California respectfully requests that the Court accept the enclosed amicus brief for filing and consideration.*

The Prosecutors Alliance of California is an organization of prosecutors committed to reforming California's criminal justice system by advancing public safety, human dignity, and community well-being. The issues presented in this appeal are particularly important to the Alliance, which has had an interest since its inception in advocating for rational criminal laws that fairly and consistently respect defendants' right to equal protection under the law. And given its members' background, the Alliance has a unique perspective on the rationality of the Legislature's distinction between special-circumstance murder and first-degree murder for purposes of the youth offender parole system. The Alliance accordingly requests leave to file the enclosed brief, which discusses the interaction between prosecutorial discretion and the youth offender parole system.

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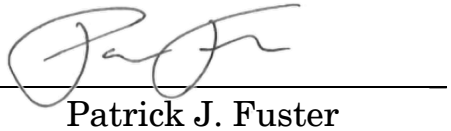
* No party or counsel for any party in this case authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

August 31, 2023

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP



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AMICUS CURIAE BRIEF

INTRODUCTION

The Prosecutors Alliance of California is an organization of prosecutors who take seriously their responsibilities to victims, their communities at large, and the defendants whose rights they are bound to respect under the rule of law. We file this brief principally to discuss the proper role of prosecutorial discretion within the youth offender parole system.

The Legislature created a youth offender parole system centered on the "hallmark features of youth" and extended this prospect of parole to people who committed their offenses before the age of 26. (Pen. Code, § 3051, subds. (a)(1), (f)(1).) But the statute also shuts a select group of young adult offenders—those, like Mr. Hardin, who are already serving life without parole (LWOP) sentences—out of the youth offender parole system. (§ 3051, subd. (h).)

The Court of Appeal held that this carveout violated the Equal Protection Clause as applied to Mr. Hardin, who was convicted of murder with a special circumstance of robbery more than three decades ago. Subdivision (h) treats young adult offenders convicted of special-circumstance murder differently from those convicted of first-degree murder. As the Court of Appeal observed, the overlap between these crimes is so great

that prosecutors have discretion to charge a special circumstance for 95% of first-degree murders.

The key question on appeal is whether the Legislature could rationally use this charging decision between special-circumstance murder and first-degree murder as the sole determinant of eligibility for youth offender parole. In our view, this question should be answered in light of the typical considerations that both inform prosecutorial discretion and bear on a young adult offender's culpability and capacity for rehabilitation. We also take this opportunity to identify racial, geographic, and temporal disparities in the youth offender parole system that the Attorney General's position would perpetuate.

Although we do not take a position on the ultimate disposition of this case, we do urge this Court to consider the varied (and sometimes unexpected) ways that prosecutorial discretion interacts with the youth offender parole system.

ARGUMENT

I. Prosecutorial discretion plays a large and often determinative role in access to the youth offender parole system.

The Supreme Court has held that the distinguishing features of youth make LWOP sentences inappropriate for almost every person who commits any crime before the age of 18. The Legislature recognized that those same mitigating factors apply

up to the age of 26, but it excluded those convicted of special-circumstance murder from the youth offender parole system while including those convicted of first-degree murder. Because special-circumstance murder overlaps almost entirely with first-degree murder, the central—virtually the only—criterion that separates the two groups is a prosecutor's charging decision.

The decision to charge a special circumstance reflects a host of factors, many of which have nothing to do with rehabilitative potential or culpability. Although culpability certainly plays a role in the exercise of prosecutorial discretion, this charging decision does not reflect a prosecutorial determination that youthful offenders are categorically incapable of rehabilitation. Prosecutors lack the information necessary to make such a determination—in fact, many young adult offenders who are currently serving LWOP sentences were charged before the legal and scientific advances that recognized the mitigating effects of youth.

We submit that the statute's purpose is to account for the these mitigating aspects of through youth offender parole. The constitutionality of Mr. Hardin's categorical exclusion should therefore be evaluated in light of how well the exercise of prosecutorial discretion aligns with the youth-based considerations that underlie the youth offender parole system.

A. The Supreme Court has recognized youth's unique effect on a juvenile's culpability and capacity for rehabilitation.

To understand the youth offender parole system established by Penal Code section 3051, one must first understand the series of U.S. Supreme Court decisions exploring the constitutionality of LWOP sentences for juveniles in light of the purposes animating criminal law. These decisions culminated in the principle that the imposition of mandatory LWOP sentences violates the Eighth Amendment for juveniles who commit their crimes before the age of 18.

The first decision was *Graham v. Florida* (2010) 560 U.S. 48, where the Supreme Court held that the Eighth Amendment invalidates LWOP sentences for all non-homicide offenses committed by offenders under the age of 18 at the time of their crimes. The Court canvassed several reasons why juveniles "are less deserving of the most severe punishments" given their "lessened culpability." (*Id.* at p. 68.) For one thing, juveniles suffer from a "lack of maturity" that makes them more "susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." (*Ibid.*, quotation marks omitted.) For another thing, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," including that 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." (*Ibid.*) These fundamental differences of youth offenders mean that LWOP sentences for non-homicide offenses do not serve *any* of the "legitimate" purposes of criminal punishment: "retribution, deterrence, incapacitation, and rehabilitation." (*Id.* at p. 71.)

The Supreme Court returned to juvenile LWOP sentences in *Miller v. Alabama* (2012) 567 U.S. 460, which extended *Graham* to homicide offenses, but with a twist. While *Graham* flatly prohibits LWOP sentences for non-homicide offenses, the Court held in *Miller* that the Eighth Amendment invalidates *mandatory* LWOP sentences for juveniles who commit murder. A court may impose an LWOP sentence only after a "consideration of [the offender's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." (*Id.* at p. 477.) Importantly, none of these youth-specific "mental traits and environmental vulnerabilities" identified in *Graham* are "*crime-specific*" but instead "are evident in the same way, and to the same degree, when . . . a botched robbery turns into a killing." (*Id.* at p. 473, italics added.) Imposition of an LWOP sentence on a juvenile, even for murder, should be "'rare'"—and properly so. (*Id.* at p. 479.)

In *Montgomery v. Louisiana* (2016) 577 U.S. 190, the Supreme Court held that *Miller* applies retroactively to people already serving LWOP sentences for crimes they committed as children. The Court reiterated that *Miller* forbids LWOP sentences "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility," not merely "transient immaturity." (*Id.* at p. 209.) The Court also held that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." (*Id.* at p. 212.)

B. The Legislature recognized that these same youth-specific traits apply to young adult offenders who commit their crimes before the age of 26.

Even before *Montgomery*, the California Legislature had already opted for the second route to comply with *Graham* and *Miller*: a youth offender parole system. That law, codified at Penal Code section 3051, brought California law in line with *Miller*'s directive that courts consider the "youthfulness of defendants facing [a life without parole] sentence," as well as neuroscientific research that the brain does not fully develop until a person's mid-twenties. (Assem. Floor Analyses, 3d reading analysis of Sen. Bill No. 260 (2013-2014 Reg. Sess.) as amended Sept. 3, 2013, p. 5.) But the Legislature did not stop there.

First, the Legislature enacted SB 260, which established a mechanism for youth offender parole hearings for individuals who committed their offenses under the age of 18. Supporters of the bill focused on youths' ability to reform, agreeing that "juveniles who commit crimes should be punished" but recognizing "that young people have a great capacity for rehabilitation." (Sen. Com. on Public Safety, Hearing on Sen. Bill No. 260 (2013-2014 Reg. Sess.) as amended Apr. 4, 2023, p. 10.)

Next, the Legislature passed SB 261, which expanded the "system of rehabilitation" for youth offenders to include people who were under the age of 23 at the time of their crime. (Assem. Com. on Public Safety, Hearing on Sen. Bill No. 261 (2015-2016 Reg. Sess.) as amended June 1, 2015, pp. 1, 4.) Supporters touted the rehabilitative success of SB 260, lauding that "'motivation to focus on rehabilitation [was] incentivized.'" (*Id.* at p. 4.) SB 261's promise that parole was possible for a wider group of young adult offenders could inspire real change.

Finally, the Legislature enacted AB 1308 to expand youth offender parole to people who were 25 or younger at the time of their crime. This extension aligned with existing "developmental and neurological evidence" demonstrating that brain development continues into a person's mid-twenties and is "highly relevant to criminal behavior and culpability." (Sen. Rules Com., 3d reading analysis of Assem. Bill No. 1308 (2017-

2018 Reg. Sess.) as amended Mar. 30, 2017, p. 7.) As before, the Legislature hung its hat on "the capacity of a young person to change and mature." (*Ibid.*)

C. The decision to charge a special circumstance is frequently all that blocks a young adult offender from accessing the youth offender parole system.

The Legislature has excluded from the youth offender parole system all people who received an LWOP sentence for an offense committed after the age of 18. (Pen. Code, § 3051, subd. (h).) That exclusion applies to someone like Mr. Hardin who was convicted of special-circumstance murder. In contrast, it does not cover someone who was convicted of first-degree murder. (§ 3051, subd. (b)(3).)

Little separates first-degree murder from special-circumstance murder. First-degree murder covers "willful, deliberate, and premeditated killing[s]," killings in the course of certain felonies (such as robberies), killings perpetrated by certain weapons, and killings during vehicle shootouts. (Pen. Code, § 189, subd. (a).) Special-circumstance murder covers much the same thing: there are 22 different special circumstances, ranging from the motive (e.g., financial gain) to the manner of killing (e.g., lying in wait) to the identity of the victim (e.g., police officers) to proximity to a felony (e.g., robbery). (§ 190.2, subds. (1)-(22).) As the Court of Appeal observed, this

substantial overlap means "special-circumstance allegations could have been charged in 95 percent of all first degree murder convictions, leaving the decision whether a life without parole sentence may be imposed to the discretion of local prosecutors." (Opn. at p. 23.)

Prosecutors count among the "most powerful actors in the criminal legal system, deciding who will be prosecuted, what charges they will face and the sentence they will serve." (*About Prosecutors Alliance: Who We Are* (Aug. 2023) <https://tinyurl.com/5yckwcwr>.) And we know from our members' experience that, when making charging decisions, prosecutors most commonly consider the strength of the evidence, the seriousness of the offense, the defendant's criminal history, and the victims' and witnesses' willingness to testify. (E.g., Bruce Frederick & Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making* (2012) 60-61, 116, 119 <https://tinyurl.com/yc3kuusu>; see also *People v. Wilkinson* (2004) 33 Cal.4th 821, 838-839 [identifying similar factors].) For special-circumstance murder in particular, a prosecutor might also consider the plea-bargaining leverage gained by charging a death-eligible offense. (Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study* (2008) 29 Justice System J. 313, 319-320.) Empirical studies in fact have found that the threat of the death penalty increases the probability of a plea

agreement by 20 to 25 percent. (E.g., Sherod Thaxton, *Leveraging Death* (2013) 103 J. Crim. L. & Criminology 475, 483.)

Charging decisions take account of many factors but typically do not assess (and are not meant to assess) "the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." (Pen. Code, § 3051, subd. (f)(1); cf. *Montgomery*, 577 U.S. at p. 212 [requiring resentencing before judge or hearing before parole board].) In some cases, reliance on a charging decision could be anachronistic because many young adult offenders currently serving LWOP sentences were charged and sentenced before the modern understanding of brain development. (See *Miller*, 567 U.S. at 472, fn. 5.) That is the case for Mr. Hardin, who was convicted in 1990. (Opn. at p. 2.) And going forward, prosecutors rarely will have the benefit of a record necessary to make a predictive judgment about the offender's capacity to change at the time of charging.

The Attorney General acknowledges that an unfavorable exercise of prosecutorial discretion is frequently all that stands between young adult offenders like Mr. Hardin and parole because of the near total-overlap of special-circumstance murder and first-degree murder. (OBM at pp. 37-38.) He defends the rationality of this distinction based on decisions upholding

overlapping crimes under the Equal Protection Clause even where prosecutors have wide discretion to choose among potential charges. (E.g., *United States v. Batchelder* (1979) 442 U.S. 114, 125.) As he points out, this Court has previously rejected equal-protection challenges to the use of special circumstances to establish eligibility for capital punishment. (E.g., *People v. Anderson* (1987) 43 Cal.3d 1104, 1147; see OBM at pp. 36-37.)

Although we do not take a position on the ultimate disposition of this case, we do respectfully submit that this case presents materially different issues than the cases challenging the use of special circumstances for capital punishment. The theory in that context is that the special circumstances have cabined death eligibility for the overall group of first-degree murders to comply with the Eighth Amendment's narrowing requirement for the death penalty. (E.g., *People v. Arias* (1996) 13 Cal.4th 92, 186-187.)

In contrast, the question here is whether the Legislature had a rational basis to use a crime-specific proxy to determine eligibility for youth offender parole even though the Supreme Court has explained that the effects of youth are *not* "crime-specific." (*Miller*, 567 U.S. at p. 473; see *People v. Montelongo* (2020) 274 Cal.Rptr.3d 267, 289 [conc. opn. of Liu, J., on denial of review].) A distinction, in other words, could satisfy the Equal

Protection Clause in one context yet be unconstitutional in another. The parties also disagree whether rehabilitation was the Legislature's only purpose or whether the Legislature also considered culpability, deterrence, and incapacitation. (Compare ABM at p. 8 with Reply Br. at p. 11.) But regardless of who is correct on this question, the attributes of youth bear on all four penological interests. (*Miller*, 567 U.S. at pp. 472-473.)

In short, prosecutorial discretion cannot trump the Equal Protection Clause's command of fair and evenhanded treatment. This Court therefore should consider how well the decision to charge a special circumstance maps onto the justifications for youth offender parole, including young adult offenders' decreased culpability and enhanced capacity for rehabilitation.

II. The distinction between special-circumstance murder and first-degree murder perpetuates troubling disparities.

Bias plagues the criminal justice system, and prosecutors are no exception. The prosecutors who make up our Alliance have aimed to rectify unjust disparities in the criminal justice system. Unfortunately, the Legislature perpetuated these disparities through its exclusion from the youth offender parole system of young adult offenders who are convicted of special-circumstance murder. The special-circumstance murder laws have been on the books for 45 years. (See *People v. Lopez* (2022)

12 Cal.5th 957, 963.) In that time, prosecutorial charging decisions have created racial, geographic, and temporal disparities between offenders who were charged with special-circumstance murder and those who were charged with murder without a special circumstance.

Racial disparities. The exclusion for special-circumstance murder has a racially disparate effect. Among all people sentenced to LWOP, 79% are people of color despite comprising just 65% of the overall population. (Com. on Revision of the Penal Code, *Annual Report and Recommendations* (2021) p. 50 <https://tinyurl.com/4nvwx9yn>; see Public Policy Institute of California, *California's Population* (2023) <https://tinyurl.com/39vs6ykd>.) Those racial disparities are even more extreme for those sentenced to LWOP who were 25 or younger at the time of the offense: 86% are people of color. (*Annual Report and Recommendations*, *supra*, at p. 53.) The consequences of that disparity are far-reaching, as 62% of people serving LWOP sentences in California were 25 years old or younger at the commission of the offense. (*Id.* at p. 54.)

Racial disparities pertaining to Black people are particularly alarming in relation to the special circumstance of felony murder, which underlies Mr. Hardin's conviction. Felony murder is the most commonly used special circumstance in California, and one that does not require the offender to have

intended to kill nor actually kill the victim. Although there are 22 special circumstances (see Pen. Code, § 190.2), data collected by the UCLA Special Circumstances Conviction Project show that felony murder was the underlying special circumstance for more than half of all LWOP sentences. (See UCLA Special Circumstances Conviction Project, *Life Without Parole and Felony Murder Sentencing in California* (2023) p. 7 <https://tinyurl.com/m74wj6pb>.) Data also show that Black people are disproportionately sentenced to LWOP under the felony-murder special circumstance. Despite making up just 5% of the population, Black people comprise 43% of those sentenced under the felony-murder special circumstance. (*Id.* at p. 8).

Geographic disparities. The distinction between special-circumstance murder and first-degree murder has also created geographic disparities that intersect with these racial disparities. One stark example is between Orange County and Sacramento County: "10.6% of individuals sentenced to life without parole in Orange County are Black, whereas 46.3% of individuals sentenced to LWOP from Sacramento are Black." (*Life Without Parole and Felony Murder Sentencing in California*, *supra*, at p. 10.) And the felony-murder disparities highlighted above are also prevalent across county lines. Consider that, "[i]n Orange County, 37.9% of individuals sentenced to LWOP received a

felony murder special circumstance while in Sacramento county, 69.8% received a felony murder special circumstance." (*Ibid.*)

Temporal disparities. Temporal happenstance likewise can be a significant factor in being charged with special-circumstance murder. The progressive prosecutors who make up our Alliance have come to office in a recent wave of reform-focused candidates following decades of tough-on-crime policies that began in the 1990s. Over time, LWOP sentencing had "expanded dramatically" from 1992 until it peaked in 2020. (See, e.g., The Sentencing Project, *Mass Incarceration Trends* (2023) p. 8 <https://tinyurl.com/mr2ts25d>); The Sentencing Project, *No End in Sight: America's Enduring Reliance on Life Imprisonment* (2021) p. 10 <https://tinyurl.com/59rm7z2h> [5,134 individuals serving LWOP in California as of 2020]); The Sentencing Project, *Nothing But Time: Elderly Americans Serving Life Without Parole* (2022) p. 5 <https://tinyurl.com/yckey9k9> [4,634 individuals serving LWOP in California as of 2022].) As a result, offenders charged during that 28-year period were more likely to receive an LWOP sentence.

Even though the overriding purpose of section 3051 is to provide a meaningful opportunity for young adult offenders to mature and then demonstrate rehabilitation, the vicissitudes of charging decisions (and politics) over time mean that someone was more likely to be convicted of special-circumstance murder

for effectively the same crime—and thus be excluded from the youth offender parole system entirely.

These disparities reveal that prosecutorial discretion, while critically important, is not a silver bullet that overcomes constitutional concerns created by a statutory scheme that is largely defined by prosecutorial discretion. We respectfully submit that this Court should consider these racial, geographic, and temporal disparities perpetuated by section 3051, subdivision (h) in ruling on Mr. Hardin's equal-protection claim.

CONCLUSION

This Court should consider the purposes and effects of prosecutorial discretion in resolving the issue presented.

August 31, 2023

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

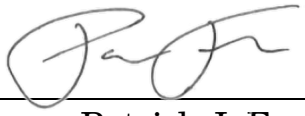
Patrick J. Fuster

Attorneys for Prosecutors Alliance of California

CERTIFICATE OF WORD COUNT

Under Rule 8.520(c)(1) of the California Rules of Court, I certify that this amicus brief contains 3,196 words, as counted by Microsoft Word, excluding the tables, this certificate, and the signature blocks.

Dated: August 31, 2023



Patrick J. Fuster

Attorneys for Prosecutors Alliance of California

PROOF OF SERVICE

I, Patrick J. Fuster, declare as follows:

I am employed in the County of Los Angeles, California. I am over the age of 18 years, and I am not a party to this action. My business address is 333 South Grand Avenue, Los Angeles, California 90071-3197. On August 31, 2023, I served this application and the accompanying brief by the following means of service:

APPLICATION TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF OF PROSECUTORS ALLIANCE OF CALIFORNIA IN SUPPORT OF NEITHER PARTY

☑ **BY ELECTRONIC SERVICE:** A true and correct copy of the above-titled document was electronically served on the persons listed on the attached service list.

☑ **BY MAIL SERVICE:** I caused a true and correct copy of the Petition for Review to be placed in a sealed envelope addressed to the trial court, to be placed for collection and mailing following our ordinary business practices. I am familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 31, 2023.

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