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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. LUIS ANGEL GUTIERREZ, Defendant and Appellant	No. _____ Court of Appeal No. B227606 Ventura County Superior Court No. 2008011529

APPEAL FROM THE JUDGMENT OF THE
CALIFORNIA SUPERIOR COURT, VENTURA COUNTY

The Honorable Patricia M. Murphy, Judge Presiding

PETITION FOR REVIEW OF THE PUBLISHED DECISION OF THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION SIX AFFIRMING CONVICTION AND LWOP JUVENILE SENTENCE

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE , CHIEF JUSTICE, AND TO ALL THE HONORABLE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Appellant Luis Angel Gutierrez respectfully requests that this Honorable Court grant review of the published opinion dated September 24, 2012, of the California Court of Appeal, Second Appellate District, Division Six, affirming the murder conviction and LWOP sentence of a juvenile offender. (See Attached Opinion (Opn.).) A Petition for Rehearing and Modification was denied summarily on October 11, 2012.

ISSUES PRESENTED FOR REVIEW

1. California law imposes a presumption on sentencing courts in cases juvenile cases involving special circumstances findings under Penal Code[1] section 190.2, that an Life Without Parole (LWOP) sentence will be imposed. (See *People v. Guinn* (1994) 28 Cal. App. 4th 1130, 1141-1142; *People v. Blackwell* (2011) 202 Cal. App. 4th 144, 159-160, interpreting section 190.5.) Does this presumption conflict with the recent recognition by the United States Supreme Court in *Miller v. Alabama* (2012) ___ U.S. ___ [183 L.Ed 2d 407, 132 S.Ct., 2455], that the Eighth Amendment requires that specific factors be considered by the sentencing court prior to imposing an LWOP sentence on a juvenile offender?

2. A juvenile defendant objects to imposition of the LWOP sentence, asking sentencing court to instead impose a sentence of 25 years to life without specifically citing the Eighth Amendment. (4 RT 869-872.) Is appellant barred from raising the Eighth Amendment issue for the first time on appeal?

3. Does the Eighth Amendment of the United States Constitution impose a categorical ban on LWOP sentences for juvenile offenders?

4. Does the recent passage of Senate Bill 9 (S.B.9) (signed into law on September 30, 2012, and scheduled to go into effect on January 1, 2014), which amends Penal Code section1170 to potentially allow juvenile offenders given LWOP sentences to apply for resentencing after 15 years, affect the constitutionality of LWOP imposed at sentencing?

5. A juvenile defendant has been released from the hospital following surgery and is taken to the police station for a custodial interview.

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[1]All statutory references are to the Penal Code unless otherwise indicated.

The defendant is advised of each of the *Miranda*[2] rights and nods when asked if he understands. The defendant is not asked if he waives his rights but in response to the first question, he requests five minutes, asks for pain medication, and inquires about his father. He is denied all three. Under these circumstances, may a waiver of *Miranda* rights be implied?

INTRODUCTION AND NECESSITY FOR REVIEW

This case involves an LWOP sentence imposed on a juvenile offender under Penal Code section 190.5, subdivision (b).[3] This statute has been interpreted to require LWOP as the "presumptive punishment" and that 16 or 17-year-olds who commit special circumstance murder "*must* be sentenced to LWOP" unless the court finds good reason to choose the less severe sentence of 25 years to life." (*People v. Guinn* (1994) 28 Cal. App. 4th 1130, 1141-1142 (emphasis in the original) see also *People v. Blackwell* (2011) 202 Cal. App. 4th 144, 159-160.) Here, the court imposed the LWOP sentence after the defendant was found guilty by a jury of first degree murder with a special circumstance finding that the crime was committed in the course of a rape or attempted rape. Appellant was 17 years old at the time of the charged offense.

After the sentence was imposed and appellant was sent to prison, the

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[2]See *Miranda v. Arizona* (1966) 384 U.S. 436.

[3] Section 190.5, subdivision (b) provides: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

United States Supreme Court issued a decision in *Miller v. Alabama* (2012) ___ U.S. ___, 183 L. Ed. 2d 407, and concluded that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. (*Id.* at 424.) In doing so, the Court established prerequisites that require a sentencing court to take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller v. Alabama, supra*, ___ U.S. ___, 183 L. Ed. 2d 407, 424.) These requirements were grounded on the Court's recognition that because juveniles "have diminished culpability and greater prospect for reform. . . they are less deserving of the most severe punishments." (*Ibid.*)

The Court identified three significant gaps between juveniles and adults: First, juveniles have a "lack of maturity and an underdeveloped sense of responsibility" leading to "recklessness, impulsivity, and heedless risk-taking." (*Miller v. Alabama, supra*, ___ U.S. ___, 183 L. Ed. 2d 407, 1418, citing *Roper v. Simmons* (2005) 543 U.S. 551, 569.) Second, juveniles are "more vulnerable . . . to negative influences and outside pressures" and have limited control over their own environment. (*Ibid.*) Third, a juvenile's character is "not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" (*Ibid.*) Therefore, the Court held that a sentencing court must "examine *all* these circumstances *before* concluding that life without any possibility of parole [is] the appropriate penalty." (*Id.* at 424 (emphasis added).) In consideration of these factors, the High Court concluded that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." (*Ibid.*)

After the *Miller* was issued appellant filed supplemental briefing in

the Court of Appeal and argued *inter alia* that due to the California case law holding that LWOP is the "presumed sentence," remand was required in order for appellant to be sentenced with full consideration of the factors determined necessary by the *Miller* Court. The Court of Appeal rejected appellant's argument, and also found that appellant's Eighth Amendment claim was forfeited. (Opn. at pp. 11-15.)

Review is necessary to ensure uniformity of law under rule 8.500 of the Rules of Court. In contrast with the instant case, in *People v. Moffett* (October 12, 2012, A133032) ___ Cal. App. 4th ___, 2012 Cal. App. Lexis 1072, *20-23, the Court of Appeal, First Appellate District, Division Five, held that due to established case law holding that LWOP is the presumptive sentence under section 190.5 and its effect on the sentencing court, remand is necessary for resentencing in light of *Miller*. The court reasoned that "[t]reating LWOP as the default sentence takes the premise in *Miller* that such sentences should be rarities and turns that premise on its head, instead of placing the burden on a youthful defendant to affirmatively demonstrate that he or she deserves an opportunity for parole." (*Id.* at *22.)

The instant case also stands in contrast with existing authority that recognized LWOP as the presumptive sentence under section 190.5. (See e.g., *People v. Guinn, supra,* 28 Cal. App. 4th 1130, 1141-1142; *People v. Blackwell* (2011) 202 Cal. App. 4th 144, 159-160; see also *People v. Ybarra* (2008) 166 Cal. App. 4th 1069, 1089, and *People v. Murray* (2012) 203 Cal. App. 4th 277, 282.) Here, the Court of Appeal makes no reference to any presumption under section 190.5, and states instead that section 190.5 "provides that a juvenile defendant 16 years of age or older who is convicted of first degree, special circumstance murder *may* be sentenced to life without the possibility of parole." (Opn. at p. 14, emphasis supplied by

the court.)

In addition to the need to ensure uniformity of law, issues pertaining to the constitutionality of LWOP sentences for juveniles involve important questions of law, including whether the California presumption of LWOP under section 190.5 violates the Eighth Amendment, and whether the Eighth Amendment issue in light if *Miller* is forfeited if objection at sentencing was not specifically articulated on that basis. This case also involves important questions of law involving whether waiver of rights under *Miranda* may be implied when a juvenile defendant is not asked if he waives his rights but in response to the first interrogation question, he requests five minutes, asks for pain medication, inquires about his father, and is denied these requests. Review is therefore necessary. (Rule 8.500.)

ARGUMENT

I. THE LIFE WITHOUT PAROLE SENTENCE IMPOSED ON A JUVENILE OFFENDER AS THE PRESUMPTIVE SENTENCE VIOLATES THE EIGHTH AMENDMENT

A. A Presumptive LWOP Sentence Imposed Under Penal Code Section 190.5 Violates the Eighth Amendment

The Eighth Amendment's prohibition against cruel and unusual punishment bars inflicting punishments that are disproportionate to the capacity of the offender to be held accountable. The difference in mental development between a juvenile and an adult-specifically, the juvenile's still developing ability to make reasoned decisions – is a major premise of the United States Supreme Court's decisions in *Roper* and in *Graham*, which held unconstitutional a sentence of life in prison without parole for a juvenile in a nonhomicide case. (*Roper v. Simmons* (2005) 543 U.S. 551 (2005); *Graham v. Florida* (2010) 560 U.S. ___, 130 S.Ct. 2011.)

In *Miller v. Alabama* (2012) ___ U.S. ___, 183 L. Ed. 2d 407, the Supreme Court considered the constitutionality of two cases involving juveniles who had been convicted of murder in adult courts and had received mandatory sentences of life without the possibility of parole. In the process, the Court drew on precedent that likened "life-without-parole sentenced imposed on juveniles to the death penalty itself." (*Id.* at 421, citing *Graham v. Florida* (2010) 560 U.S.___, 130 S. Ct. 2011, 2027.) The Court recognized that LWOP sentences "share characteristics with death sentences that are shared by no other sentences." (*Ibid.*) The Court also observed that "this lengthiest possible incarceration is an 'especially harsh punishment for a juvenile.' because he will almost inevitably serve 'more years and a greater percentage of his life in prison that an adult offender.'"

(*Ibid.*) The Court concluded that the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." (*Id.* at 424.) Because that holding was sufficient to decide the two cases, the *Miller* Court did not reach the issue of whether the Eighth Amendment requires a categorical bar on life without parole for juveniles. (*Ibid.*)

Although the decision in *Miller* did not foreclose such a sentence, the High Court established prerequisites that require a sentencing court to take into account "[1] how children are different, and [2] how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller v. Alabama, supra,* ___ U.S. ___, 183 L. Ed. 2d 407, 424.) These requirements were grounded on the Court's recognition that because juveniles "have diminished culpability and greater prospect for reform. . . they are less deserving of the most severe punishments." (*Ibid.*)

The Court further recognized three significant gaps between juveniles and adults: First, juveniles have a "lack of maturity and an underdeveloped sense of responsibility" leading to "recklessness, impulsivity, and heedless risk-taking." (*Miller v. Alabama, supra,* ___ U.S. ___, 183 L. Ed. 2d 407, 1418, citing *Roper v. Simmons* (2005) 543 U.S. 551, 569.) Second, juveniles are "more vulnerable . . . to negative influences and outside pressures" and have limited control over their own environment. (*Ibid.*) Third, a juvenile's character is "not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" (*Ibid.*) Therefore, the Court held that a sentencer must "examine *all* these circumstances *before* concluding that life without any possibility of parole [is] the appropriate penalty." (*Id.* at 424 (emphasis added).) Based on these factors, the Court concluded,

"appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." (*Ibid.*)

California Penal Code section 190.5, subdivision (b) provides:

> The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.

The above statute has been interpreted to require LWOP as the "presumptive punishment" under section 190.5, and that 16 or 17-year-olds who commit special circumstance murder "*must* be sentenced to LWOP" unless the court finds good reason to choose the less severe sentence of 25 years to life." (*People v. Guinn* (1994) 28 Cal. App. 4th 1130, 1141-1142 (emphasis in the original) see also *People v. Blackwell* (2011) 202 Cal. App. 4th 144, 159-160.) The California statute is distinct from those addressed in *Miller* which did not permit any sentence but LWOP. However, by establishing LWOP as the presumptive punishment, and by failing to require sentencing courts to address the factors mandated by *Miller* before concluding that life without any possibility of parole is the appropriate penalty, section 190.5 runs afoul of the Eighth Amendment.

In *People v. Moffett*, *supra*, ___ Cal. App. 4th ___ , 2012 Cal. App. Lexis 1072, *21, the Court of Appeal, First Appellate District, Division Five, determined that "[a] presumption in favor of LWOP, such as that as applied in this case, is contrary to the spirit, if not the letter, of *Miller*, which cautions that LWOP sentences should be "uncommon" given the "great difficulty ... of distinguishing at this early age between 'the juvenile

offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption..'" (See *Miller, supra*, 567 U.S. at ____ [132 S.Ct. at p. 2469] .) The *Moffett* court further explained, that although *Miller* does not categorically bar LWOP sentences in juvenile homicide cases, "it recognizes that juveniles are different from adults in ways that "counsel against irrevocably sentencing them to a lifetime in prison. . . . Treating LWOP as the default sentence takes the premise in Miller that such sentences should be rarities and turns that premise on its head, instead placing the burden on a youthful defendant to affirmatively demonstrate that he or she deserves an opportunity for parole. (*Moffett, supra*, 2012 Cal. App. Lexis 1072, *21-22.)

In the instant case, the Court of Appeal does not acknowledge the established presumption of LWOP sentencing under section 190.5. Instead, the court states that section 190.5 "provides that a juvenile defendant 16 years of age or older who is convicted of first degree, special circumstance murder *may* be sentenced to life without the possibility of parole." (Opn. at p. 14, emphasis supplied by the court.) The court also states that the sentencing court here was aware of its discretion and declined to impose a more lenient sentence.[4] (Opn. at p. 15.) Appellant does not disagree that

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[4]Operating from the presumptive LWOP stance the court briefly mentioned appellant's "age" but focused primarily on the details of the crime. (3 RT 873-874.) The court also cited alleged disciplinary write-ups during appellant's 891 days of pre-sentence custody, a factor not even included within the scope of section 190.3. (3 RT 874.) Most significantly, the record fails to show that the court specifically addressed, as required in *Miller*, how juveniles are different and how those differences counsel against irrevocably sentencing appellant to a lifetime in prison. (*Miller v. Alabama, supra*, ___ U.S. ___, 183 L. Ed. 2d 407, 424.) The necessary factors include consideration of "lack of maturity and an underdeveloped sense of responsibility," "recklessness, impulsivity, and heedless risk-taking," and the fact that a juvenile's character is not as "well formed" as an adult's, that

section 950.5 should be construed as not imposing a presumptive LWOP sentence, or that the trial court was aware that it had some discretion. However, under principles of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455, it must be presumed that the sentencing court was acting in accordance with the established case law that LWOP was the presumptive sentence. (See *People v. Guinn, supra,* 28 Cal. App. 4th 1130, 1141-1142; *People v. Blackwell, supra,* 202 Cal. App. 4th 144, 159-160; *People v. Ybarra, supra,* 166 Cal. App. 4th 1069, 1089; *People v. Murray, supra,* 203 Cal. App. 4th 277, 282.) At the time of sentencing, the trial court did not have the benefit of the appellate opinion in this case suggesting for the first time that section 190.5 does not, in fact, create a presumptive LWOP sentence. Regardless of whether the judge here explicitly referred to the standard governing the section 190.5(b) determination, the sentencing court is presumed to have followed *Guinn* and to have treated LWOP as the "generally mandatory" or "presumptive punishment." (See generally Evid. Code § 664; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496 ["a trial court is presumed to have been aware of and followed the applicable law"].) Remand is therefore necessary.

Although appellant was 17-years old at the time of the offense, had no criminal or juvenile offense history, had only a ninth grade education and was relatively immature. (Report of Probation Officer (RPO) at pp.1-2.) While in custody, he was assaulted by another inmate and sustained bleeding to the brain. (RPO at p. 3.) In imposing the LWOP sentence the court described appellant's conduct as "inexplicable" and notes the absence

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his traits are "less fixed," and his actions less likely to be evidence of irretrievable depravity. (*Miller v. Alabama, supra,* ___ U.S. ___, 183 L. Ed. 2d 407, 1418.)

of any "rationale explanation" as to how the defendant could have found himself in this position. (3 RT 873.) This left open the unaddressed aspect as to what extent appellant's alleged conduct was due to "recklessness, impulsivity, and heedless risk-taking," due to his immaturity and the fact that as a juvenile, his character is not as "well formed" as an adult's and that his traits are "less fixed." (*Miller v. Alabama, supra*, ___ U.S. ___, 183 L. Ed. 2d 407, 1418.)

Appellant does not begin to suggest that the nature of the offense, described by the sentencing court as "horrific," is irrelevant in sentencing. But in light of the established legal presumptions this record shows that, counter to *Miller*, the court failed to examine all of the required factors *before* concluding that life without any possibility of parole was the appropriate penalty, and instead, viewing LWOP as the presumptive sentence, imposed it with only the most perfunctory and passing reference to age. In *Miller*, the High Court found two state statutes unconstitutional because they precluded sentencing courts from considering the necessary factors before imposing an LWOP sentence. Our statute is unconstitutional because it does not require the sentencing courts to consider the necessary factors before imposing an LWOP sentence.

B. Recent Passage of S.B. 9 Does Not Diminish the Eighth Amendment Claim

On September 30, 2012, Governor Brown signed into law Senate Bill 9 (S.B. 9) pertaining to a LWOP sentences of juveniles, which is scheduled to go into effect on January 1, 2014. (See Penal Code section

1170 (added by Stats. 2012, ch. 828.)[5] S.B 9 does not diminish the necessity of this Court to recognize that the presumptive LWOP sentence under section 190.5 violates the Eighth Amendment.[6] Under S.B. 9, "[w]hen a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing." (Section 1170, subd. (d)(2)(A)(I).) The person must assert a series of prerequisites in a petition filed with the sentencing court pursuant to section 1170, subdivision (d)(2)(B)), and under section 1170, subdivision (d)(2)(E),

> If the court finds by a preponderance of the evidence that the statements in the petition are true, the court shall hold a hearing to consider whether to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence."[7] If denied, the

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[5] The entire text of S.B. 9 can be accessed at: http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_9_bill_20120930_chaptered.html.

[6]This issue was brought to the attention of the Court of Appeal in a petition for rehearing, which was denied.

[7]Section 1170, subdivision (d)(2)(F) provides:

The factors that the court may consider when determining whether to recall and resentence include, but are not limited to, the following:

(I) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.

person may re-apply after completion of 20 years, and again and finally, after completion of 24 years. (See section 1170, subd. (d)(2)(H).

S.B. 9 does not cure the constitutional deficit of section 190.5 as interpreted by *Guinn* and applied by the sentencing court. Under *Miller*, a sentencer must considered the required factors "*before* concluding that life without any possibility of parole [is] the appropriate penalty." (*Id.* at 424 (emphasis added).) By placing a burden on the juvenile offender at some point in the future to establish new criteria by a preponderance of the evidence, S.B. 9 fails to remedy the improper and presumptively imposed LWOP sentence. Additionally, there is no guarantee that the new statute will not be amended or even repealed before appellant ever has an

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(iii) The defendant committed the offense with at least one adult codefendant.

(iv) Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.

(v) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense.

(vi) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(vii) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.

(viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

Additionally, section 1170, subdivision (d)(2)(I) provides:

"In addition to the criteria in subparagraph (F), the court may consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria."

opportunity to seek relief under its provisions. Under the principles established in *Miller*, appellant had the right to remand immediately to ensure that he receives a proper sentence based on the correct presumptions and required factors. Review is therefore necessary.

II. FAILURE TO INVOKE THE EIGHTH AMENDMENT AT SENTENCING DOES NOT RESULT IN FORFEITURE OR PRECLUDE A DETERMINATION ON THE MERITS

In the Opinion, the Court of Appeal states that appellant "failed to object to the [LWOP] sentence" and forfeited his right to challenge the sentence as cruel and unusual punishment. (Opn. at p. 11.) However, appellant *did* object to the LWOP sentence, requesting the lesser sentence of 25 years to life instead. (4 RT 869-872.) Moreover, at the time of appellant's sentencing on August 23, 2010, no court had recognized that LWOP sentences for juveniles in *homicide* cases may be unconstitutional. Shortly before the sentencing, the United States Supreme Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did *not* commit homicide." (*Graham v. Florida, supra,* 560 U.S.___ [176 L.Ed. 2d 825] emphasis added).) In any event, lack of an objection at sentencing based on the Eighth Amendment is no bar to subsequent appellate review of this issue.

First, it is well-established that appellate courts as well as trial courts can determine whether a sentence is cruel or unusual punishment. (*People v. Sandoval* (1987) 194 Cal.App.3d 481, 487; *People v. Williams* (1986) 180 Cal.App.3d 922, 926; *People v. Leigh* (1985) 168 Cal.App.3d 217, 223; *People v. Keogh* (1975) 46 Cal.App.3d 919, 931.) There is also an established principle that "[a]n appellate court is generally not prohibited

from reaching a question that has not been preserved for review by a party." (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Demirdjian* (2006) 144 Cal.App.4th 10, 13-14 [applying *Williams* to assertedly waived claim of cruel and unusual punishment].) Furthermore, a defendant is permitted to raise claims asserting the deprivation of certain fundamental, constitutional rights for the first time on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277, citing *People v. Saunders* (1993) 5 Cal.4th 580, 592 [plea of once in jeopardy] and *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [constitutional right to jury trial].)

Additionally, a statutory basis to review the issue exists under Penal Code section 1259, which, in relevant part, provides: "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, . . . and which affected the substantial rights of the defendant." The imposition of the sentence in violation of petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution affects his substantial rights and thus is reviewable without an objection below.

Second, even though a consideration of whether a punishment is cruel/unusual necessarily includes a consideration of the facts of the case and the factual circumstances of the defendant, all the necessary facts are before this court in the record on appeal. Where there are no conflicting facts, a claim that a sentence is cruel or unusual punishment is a question of law. (*People v. Mora* (1995) 39 Cal.App.4th 607, 615.) As such, the claim is reviewed de novo. (Ibid; see also, *People v. Anderson* (1972) 6 Cal.3d 628, 641.) Moreover, pure questions of law, including those involving

constitutional questions, can be raised for the first time on appeal. *(Sobiek v. Superior Court* (1972) 28 Cal.App.3d 846, 850-851; *In re Nathaniel P.* (1989) 211 Cal.App.3d 660, 668-669; *People v. Whitfield* (1993) 19 Cal.App.4th 1652, 1657, fn. 6; *In re Samuel V.* (1990) 225 Cal.App.3d 511, 515.) As appellant noted earlier, all the facts necessary to a determination in this case appear in the record on appeal.

Third, cruel or unusual punishment contentions traditionally have been addressed by appellate courts in the first instance. It is only recently that the appellate courts established that trial courts also may review the issue. This is best illustrated by *People v. Leigh, supra*, 168 Cal.App.3d 217. In that case the trial court stated that it believed it lacked discretion to find the sentence cruel or unusual under *People v. Dillon* (1983) 34 Cal.3d 441, and that only the appellate courts had the power to make such a finding. (Id. at p. 223.) The Court of Appeal disagreed, holding that although appellate courts have authority to decide the issue, trial courts also possess that power. (Id. at pp. 223-224.) It thus appears that although trial courts have the power to determine if a sentence is cruel or unusual punishment, that power is no greater than that of the appellate court. Either should be able to consider the issue in the first instance.

Finally, several courts addressing the issue of whether a cruel/unusual punishment claim may be addressed to the reviewing court in the first instance have held the claim to be forfeited without an objection but have nevertheless decided the merits to preclude having to rule on the issue as one of ineffective assistance of counsel. (E.g., *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) There is ample justification and support for the Eighth Amendment issue to be addressed without an objection below. Review should therefore

be granted in light of the Court of Appeal's determination.

III. THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRES A CATEGORICAL BAR AGAINST LWOP SENTENCES FOR JUVENILE OFFENDERS.

As previously noted, the *Miller* Court did not reach the question as to whether there must be a categorical ban of LWOP sentences for juveniles. However, it has been recognized that a juvenile's culpability, even for homicide, is substantially less than an adult's. (*Roper v. Simmons, supra*, 543 U.S. at 370.) Imposing the most severe non-death punishment on a juvenile is not, therefore proportional to juvenile culpability. A life without parole sentence is a "denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." (*Graham, supra*, 560 U.S.___, 130 S.Ct. at 2027, quoting *Naovarath v. State* (1989) 105 Nev. 525, 526.) Life without parole in practicality is a death sentence: It is especially harsh for a juvenile offender, who will serve both a greater number of years as well as a greater percentage of his life in prison than an adult. (*Ibid.*, *Roper, supra*, 543 U.S. at 572.) The lessened culpability of a juvenile-when compared to the greater relative severity of the punishment-does not meet contemporary standards of decency.

Society recognizes that juveniles are different, even without specific statistics about sentencing. California has enacted numerous laws that limit the rights and privileges of a minor. (See Cal. Const. Art. II, § 2 [setting the minimum voting age at 18]; Vehicle Code section 12814.6 (must be 16 to obtain a driving license); Bus. & Prof. Code section 25658, subdivision (b)

(setting the minimum drinking age at 21); Family Code section 6701, (regarding minors' capacity to enter into contracts); Family Code, § 302 (must be 18 to enter into a marriage contract without parental consent); Probate Code section 6100 (must be 18 to make a will); Code of Civil Procedure section 203 (must be 18 to serve on a jury, Pen. Code § 261.5 (a person must be 18 years old to legally consent to sexual intercourse).) This legislation shows that society recognizes that, in a variety of situations, juveniles should be and are treated differently from adults.

In *Roper*, and *Graham*, the Supreme Court has acknowledged that modern science now has established as fact the differences in juvenile brains and the effects of those differences on behavior and culpability. For instance, in *Roper*, the majority cites Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist, November 2009, at 1009, 1014; (*Roper, supra*, 43 U.S. at 569.) Laurence Steinberg, one of the authors cited in *Roper*, has a more recent review of the science in the November 2009 issue of the same journal. Lawrence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy*? 64 Am. Psychologist, November 2009, at 742-43. Steinberg notes four specific noteworthy changes in the brain during adolescence:

First, there is a decrease in gray matter in the prefrontal regions of the brain during adolescence-most likely due to the elimination of unused neuronal connections. This biological change results in major improvements in information processing and logical reasoning as the adolescent matures. (*Id.* at 742.) Second, there is a significant change in activity of the neurotransmitter dopamine. Shifts in the proliferation and redistribution of dopamine receptors are believed to affect adolescent's weighing of costs

and rewards of behavior. (*Id.* at 743.) Third, there is an increase during adolescence of white matter in the prefrontal regions. This increased white matter affects the adolescent's response inhibition, long-term planning, weighing of risks and benefits, and the simultaneous consideration of multiple sources of information. (*Ibid.*) Finally, as the juvenile ages, there is an increase in connections between the cortical and subcortical regions, a change that is important for regulation of emotion. (*Ibid.*)

This current research confirms what the Supreme Court majority said in *Graham*: No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. [D]evelopments 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. 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. Thus, a categorical ban of LWOP sentences for juveniles is required under the Eighth Amendment.

IV. REVIEW IS NECESSARY TO DETERMINE WHETHER A *MIRANDA* WAIVER MAY BE IMPLIED WHEN A JUVENILE DEFENDANT, AFTER BEING ADVISED OF HIS RIGHTS, IS NOT ASKED IF HE WAIVES HIS RIGHTS, AND IN RESPONSE TO THE FIRST QUESTION HE REQUESTS FIVE MINUTES, ASKS FOR PAIN MEDICATION, AND INQUIRES ABOUT HIS FATHER, AND IS DENIED ALL THREE

A. Introduction

It has long been established that a suspect may not be subjected to interrogation in official custody unless he has previously been advised of,

and has knowingly and intelligently waived, his rights to silence, to the presence of an attorney, and to appointed counsel if he is indigent. (*Miranda v. Arizona* (1966) 384 U.S. 436, 444-445 ("*Miranda*").) Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused "in fact knowingly and voluntarily waived [*Miranda*] rights" when making the statement. (*Berghuis v. Thomkins* (2010) 560 U.S. ___, 130 S. Ct. 2250, 2260 ("*Berghuis*"), quoting *North Carolina v. Butler* (1979) 441 U.S. 369, 373.)

'[I]f the accused indicates in any manner that he wishes to remain silent or to consult an attorney, interrogation must cease, and any statement obtained from him during interrogation thereafter may not be admitted against him at his trial' [citation], at least during the prosecution's case-in-chief [citations]." (*People v. Nelson* (2012) 53 Cal. 4th 367, 374, quoting *People v. Lessie* (2010) 47 Cal. 4th 1152, 1162.) A valid waiver "will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." (*Miranda, supra*, 384 U.S. at 475.) However, the prosecution does not need to show that a waiver of *Miranda* rights was express. An "implicit waiver" of the "right to remain silent" is sufficient to admit a suspect's statement into evidence. (*Berghuis*, supra, 560 U.S. ___, 130 S.Ct. at 2261, citing *Butler, supra*, at 376.)

The Fifth Amendment rights to silence and the assistance of counsel in the context of a custodial interrogation apply to minors: State and federal courts have emphasized that review of admissions and confessions of juveniles require special caution, and that courts must use "special care in scrutinizing the record" to determine whether a minor's custodial

confession is voluntary. (*People v. Lessie, supra,* 47 Cal. 4th 1152, 1166-1167, *In re Gault* (1967) 387 U.S. 1, 45, *Haley v. Ohio* (1948) 332 U.S. 596, 599, U.S. Const. V, VI, XIV.) Although the Truth-in-Evidence provisions of the California Constitution precludes presumptive rules of exclusion not required by federal law, the above cautions remain applicable. (*Id* at 1167 [disapproving former rule under *People v. Burton* (1971) 6 Cal. 3d 375, that a request by a juvenile to see a parent must be presumptively construed as invocation of the right to counsel].) Courts must not blind themselves to the differences between minors and adults in the context of custodial interrogations. (*Ibid.*, citing *Fare v. Michael C.* (1979) 442 U.S. 707.) The totality approach mandates inquiry into all the circumstances surrounding the interrogation, including "evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of the Fifth Amendment rights, and the consequences of waiving those rights." (*Ibid.*, quoting *Fare*, at p. 725.)

In *People v. Nelson, supra,* 53 Cal. 4th 367, this Court considered whether a minor defendant made a postwaiver invocation of his *Miranda* rights by asking several times to speak to his mother and by making certain other statements while being questioned. (*Id.* at 371.) This Court concluded that "once a juvenile suspect has made a valid waiver of his or her *Miranda* rights, any subsequent assertion of the right to counsel or right to silence during questioning must be articulated sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be an invocation of such rights." (*Id.* at 385, citing *Davis v. United States* (1994) 512 U.S. 542.) The *Nelson* case has little application here because the instant case does not involve a postwaiver invocation:

Here there was no initial waiver.

Before trial, appellant filed a "Motion to Suppress Statements in Violation of Miranda," alleging that he had been subject to a custodial interrogation without a waiver of his *Miranda* rights, and that his statements had been coerced. (1 CT 82-96.) The motion contended and the evidence showed that while appellant was a suspect, he was contacted by law enforcement officers when he was at the hospital being treated for knife wounds to his hand and leg. (1 CT 84, 1 RT 9-11.) After having surgery on his hand the previous day, appellant was cleared to be released but was immediately taken into custody and brought to the Simi Valley Police Station to be interviewed. (1 CT 84, 1 RT 16-17.) Appellant alleged that he never waived his *Miranda* rights and that law enforcement coerced appellant into confessing involuntarily. (1 CT 88-89.)

A videotape of the interview shows appellant still in a hospital gown and without shoes with a large cast on his arm. (See Court Special Exhibit 1 ("Exh. 1").) The interview was conducted by Detective Jay Carrott and Detective Lincoln Purcell, and starts with Purcell advising appellant of his rights in Spanish. Purcell did not ask appellant if he was willing to waive his rights, but began asked him to explain what happened to his hand. (3 CT 490, 492, Exh. 1, .01-.44.) Appellant responded, "Uh, ah. I don't feel good right now. Can you give me 5 minutes, a little bit?"[8] (3 CT 492, Exh. 1, .44-50.) Appellant also asked for a pill, and was told they could not give him medicine. (3 CT 492.) Carrott left the room briefly, and while he was gone, appellant asked Purcell if his father was there. (3 CT 493, Exh. 1,

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[8]Appellant spoke Spanish throughout the interview, which was translated into English for the transcript of the video admitted into evidence. (3 RT 491-682.)

1:25-1:45.) Purcell said he had not seen him. (3 CT 493.) Carrott returned and told Purcell to tell appellant in Spanish that the hospital did not give him any pain medication and said he was fine like that. (3 CT 493, Exh. 1, 1:59-2:20.) Purcell resumed the interview stating, "Let's talk about your hand." (3 CT 493, Exh. 1, 2:22.)

The detectives continued the interrogation for two hours and forty minutes, during which appellant asked about his father several more times. When officers started to show appellant clothing they had found in his closet appellant asked, "And does my father know that we are here?" (3 CT 560.) Later he said directly, "I would like to see my dad." (3 CT 600.) Appellant was told, "Okay. We can communicate to him, we can get in touch with your dad, but before doing this, we want to understand like how this happened. So that we can also explain it to your dad. Because your dad is going to have a difficult time understanding this, okay?" (3 CT 600.) Appellant asked two more times for five minutes, but the officers refused his requests to see his father and to stop the interview, stating, "Let's do this. Right now is the time to tell the truth. (3 CT 601.) Later, appellant stated again, "I wish that my father were here with me." (3 CT 630.) Officers told him they would get him there, but continued with the interview without getting his father. (3 CT 630.)

The trial court ruled that there was no express invocation of appellant's rights to remain silent or to have a lawyer present, and that there was an implied waiver of his rights that was "free and voluntary." (1 RT 41-46.) In doing so, the court found that "[t]here was nothing express or implied by his conduct that suggested to anyone or this Court that the defendant wanted to cease the questioning, wanted to remain silent or wanted a lawyer present during the questioning." (1 RT 43-44.)

The trial court's ruling was not well founded because it was based upon an factual premise that was not correct. The court stated: "Based on his indication to stop the interview for the five-minute period, he demonstrated to me satisfactorily that he understood that he was in control of the situation, and the officers complied with his request." (1 RT 44.) This view was also urged on the court by prosecutor who argued, "And then we have his verbal responses to the officers. His request for a five minute break is actually honored." (1 RT 42.) However, the video itself proves otherwise.

The video shows that Detective Purcell spent the first 44 seconds of the interview advising appellant of his *Miranda* rights. (Exh., 1, .01-.44.) When Purcell began to question him, appellant immediately responded, "Uh, ah. I don't feel good right now. Can you give me five minutes, a little bit?" (3 CT 493, Exh. 1, 0.44-0.50.) Purcell told Detective Carrot that appellant wanted five minutes and Carrott said to Purcell in English, "Sure" but this message was not conveyed to appellant in Spanish, and neither of the officers actually honored the request. (3 CT 492-494.) Appellant, asked for a pill and was told they could not give him medication. (3 CT 492-493.) Detective Carrott left the room to "check something" but came back saying the hospital did not give him any medication. (3 CT 493, Exh. 1:45-2:00.)

Purcell immediately resumed questioning saying "Let's talk about your hand please." (3 CT 494, Exh.1, 2.22.) This occurred at two minutes and twenty-two seconds into the interview, a mere 92 seconds after appellant's initial request for five minutes. (3 CT 492-494, Exh. 0.50 - 2.22.) In the five minutes following appellant's initial request for five minutes, the officers repeatedly questioned appellant about how he had hurt

his hand, told him they were confused by variations he had given about how his hand was cut, asked him to explain everything that had happened from the time he left a party until he arrived at home, denied him medication for pain, and disregarded his request for his father. (3 CT 492-497, Exh. 1, 0.44-0.50 through 5:50.) Based on the above, the court's conclusion that appellant demonstrated he was in control of the situation and that the officers honored his request was without factual basis.[9]

Evidence of the interview was admitted into evidence, including the testimony of Detective Purcell and an audio recording and transcript of the interview. (2 RT 277-278, 374-428, People's Exhibits 38, 38A, and 38B.) In closing argument, the prosecutor made extensive and repeated references to appellant's statements, emphasizing alleged admissions and encouraging jurors to consider evidence of appellant's purported lies during the interview as evidence of guilt. (4 RT 760-764, 775-776.) The prosecutor also encouraged the jurors to read the transcript of the custodial interview and played the DVD recording of statements made during a walk through of

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[9]Appellant's second and third requests for five minutes were treated with even less "honor." During the course of the interrogation appellant stated again "I wish for about five minutes, just for a little bit," and then repeated, "Could you give me five minutes?" (CT 601.) The officers refused to stop the interview stating, "Let's do this. Right now is the time to tell the truth. . . .We know that this hurts you. We know this . . . .We know that you want to tell the truth, and you want to do the fair thing. We understand this. I don't know if you remember him, the day in the hospital. I told you. I don't think you are a bad man . . . .But we have to. . . . Now is the moment when the truth comes out. So that it doesn't hurt you anymore. . . . What happened. . . . We can see it in your eyes that you, that this hurts you. Okay? . . . Please tell us." (3 CT 602.) As a result of this pressure, appellant began to talk about the conflict between him and his aunt. (3 CT 602-615.) In sum, not only was the court was wrong that the officers had complied with appellant's requests and that he was in control of the interview, but the record shows that the officers patently refused his repeated requests to stop the questioning. (*Ibid.*)

the crime scene. (4 RT 759-760, 784-785, People's Exhibit 37.)

B. Appellant's Statements Should have Been Suppressed Because His Express Efforts to Forestall the Interview Were Not Honored.

Because appellant's initial invocation of the right to remain silent – albeit for five minutes -- was not "honored," the entire subsequent interview was the product of the officer's interrogation of appellant in violation of his Fifth Amendment right to remain silent. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (*Michigan v. Mosley* (1975) 423 U.S. 96, 100.) The right to "cut off questioning" is a "critical safeguard." (*Id.* at 103, quoting *Miranda v. Arizona, supra,* 384 U.S. 436, 474.) Through the exercise of the option to terminate questioning it is necessary that a defendant can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. (*Ibid.*)

In the Opinion, the Court of Appeal addresses appellant's contentions that he was interrogated in violation of his rights under *Miranda v. Arizona, supra,* 384 U.S. 436, finding that there was no violation. (Opn. at pp. 3-11.) However, the appellate court's conclusions are based on a flawed construction of the facts of this case. The Opinion states that after Officer Purcell read each advisement to appellant from a card and appellant indicated he understood,

> Officer Purcell asked how appellant cut his hand. Appellant said, "I don't feel good right now" and asked for a five minute break. Officer Purcell and his partner, Detective Jan Carrott, honored appellant's request and stopped the questioning.
>
> Appellant broke the silence a minute later and asked for a pill. Officer Purcell explained that the police were not

> authorized to administer medication and confirmed that the hospital hand not prescribed any medication when it released appellant. Appellant said that his hand was "stinging" but agreed to proceed with the interview. (Opn. at p. 5.)

The Opinion is not correct that [a]ppellant broke the silence a minute later and asked for a pill." The video shows that within *one* second after appellant's request for five minutes was translated by Officer Purcell for the non-Spanish speaking Officer Carrott, appellant asked for a pill. (Exh. 1, 0.57-0.58, 3 CT 492.)[10] Carrott then left the room briefly and appellant asked Purcell for his father. (Exh. 1, 1:25-1:45.) The video shows that Carrott returned and told Purcell to tell appellant in Spanish that the hospital did not give him any pain medication and said he was fine like that. (3 CT 493, Exh. 1, 1:59-2:20.) Purcell immediately resumed his questioning of appellant and said. "Let's talk about your hand." (3 CT 493, Exh. 1, 2:22.)

All of the above, the complete *Miranda* advisement, the initial question about appellant's hand, appellant's immediate request for a break in questioning, his immediate request for medication, his question about his father, the officers' denial of his requests, and their resumption of the interrogation, took place within the first 2 minutes and 22 seconds of the video. (Exh 1, .01-2.22.) Based on this record there is no support for the conclusion that officers honored appellant's request for five minutes at the outset of the interview, and that this demonstrated that appellant was "in control of the situation, and the officers complied with his request." (RB at pp. 10, 13, 1 RT 44.)

In a footnote, the court states that appellant confuses *Miranda* waiver

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[10] These details were brought to the attention of the Court of Appeal in a petition for rehearing, which was denied.

with the invocation of a defendant's right to remain silent, and that "[a]ppellant waived his *Miranda* rights and asked for a break." (Opn. at p. 5, fn. 5.) However, the author of the opinion fails to identify a single fact that support the legal conclusion that appellant "waived his *Miranda* rights." The author is correct in noting that appellant nodded his head up and down in the affirmative indicating that he understood each right being read. (Opn. at p. 5.) Understanding is not the same as waiving. After the rights were read, Officer Purcell immediately started questioning appellant. If appellant had answered the question, an implied waiver could have been inferred. (*People v. Cruz* (2008) 44 Cal. 4th 636, 668.) However, appellant did not answer the question. Instead, he immediately asked for a for a five-minute break that was never honored. The Court of Appeal is wrong too suggest that appellant "waived' his *Miranda* rights by asking that the questioning be stopped without having answered a single question. Appellant succumbed to the questioning only *after* the officers rejected his request for a stop in questioning, rejected his request for medication, and disregarded his request about his father. No precedent has determined that such a sequence amounts to a waiver of *Miranda* rights.

C. Appellant's Statements Should Have Been Suppressed Because they Were the Result of Coercion in Violation of Due Process.

A statement is involuntary if it is not the product of "a rational intellect and free will." (*People v. McWhorter* (2009) 47 Cal. 4th 318, 346, quoting *Mincey v. Arizona* (1978) 437 U.S. 385, 398.) The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he confessed." (*Ibid.*, quoting *Lynumn v. Illinois* (1963) 372 U.S. 528, 534.) "The question posed by the due process

clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were 'such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." (*Ibid.*) In determining whether or not an accused's will was overborne, "an examination must be made of 'all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.'" (*Ibid.*)

In *Mincey v. Arizona, supra*, 437 U.S. 385, 401-402, the United States Supreme Court recognized that a finding of coercion did not require evidence of gross abuses such as beatings, or truth serum, but that coercion would be found if the defendant's statements were not "the product of his free and rational choice." The High Court also found that "*any* criminal use against a defendant of his *involuntary* statement is a denial of due process of law ' even though there is ample evidence aside from the confession to support the conviction.'" (*Id.* at 398 [emphasis supplied by the court], quoting *Jackson v. Denno* (1964) 378 U.S. 368, 376.) The Court ruled that the defendant's confession was not admissible because, *inter alia*, it was obtained when the person was in the hospital, was weakened by pain, was isolated from family, friends and legal counsel, and his will was overborne. (*Id.* at 401-402.) Appellant's situation was similar. Although he was no longer in the hospital, he had just been released from surgery, still in his hospital gown, without shoes, and in a lot of pain. (1 RT 16-17, Exh. 1.) Appellant, too, was isolated from family, friends and legal counsel. (*Ibid.*)

Furthermore, although the officers were unaware that appellant was a juvenile at the time of the interrogation, his age and experience are factors to consider in determining whether his statements were voluntary. (*People v. Lessie, supra*, 47 Cal. 4th 1152, 1167, *Fare v. Michael C. (1979)* 442 U.S. 707, 724-725.) The combined factors of appellant's youth, his surgery just

one day previously, his persistent pain and lack of medication, the officers' refusal to halt the interview at appellant's requests, and denial of access to his father, all amounted to conditions that overbore appellant's will which rendered the statement involuntary under the Due Process Clause of the United States Constitution. (*Mincey v. Arizona, supra*, 437 U.S. 385, 398, U.S. Const. Amends. V, XIV.) The statements should therefore have been excluded.

D. Reversal was Required

The applicable standard of prejudice is the federal standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24, under which the reviewing court must be able to declare a belief that the errors were harmless beyond a reasonable doubt. (*People v. Cahill* (1993) 5 Cal. 4th 478, 509-510.) Although there was other evidence of appellant's guilt, there is more than a reasonable doubt that absent the appellant's statements he would have been convicted and subject to sentencing under a special circumstance finding.

Reliance by the prosecution on erroneously admitted evidence is an sign of prejudice. (*People v. Wharton* (1991) 53 Cal. 3d 522, 598, see also *People v. Guzman* (1988) 45 Cal. 3d 915, 963 [prosecution effort to capitalize on erroneously admitted evidence relevant for deciding whether reversal is required].) Here, the prosecution made frequent references to appellant's statements in closing argument, emphasizing alleged admissions and encouraging jurors to consider evidence of appellant's purported lies during the interview as evidence of guilt. (4 RT 760-764, 775-776.) The prosecutor also compiled a board regarding appellant's statements, listing them as reasonable on one side and unreasonable on the other. (4 RT 835.) Regarding the special circumstance allegation, the prosecution stated,

> That is his admissions out of his own mouth. That's the floor we start with. We know more occurred, and we know it occurred because of the evidence in the investigation of the professionals in this case, but with respect to his statement coming out of his mouth, he himself is saying there is sexual contact to the point where she is unclothed, he is unclothed and he is lying down on top of her. That is out of his mouth, and that is his statements.
>
> Now, he's saying that she asked him to remove her clothing, that she pulled him on top of her, but nevertheless, he is still admitting to the sexual conduct, and I will go further and say that is the attempted rape. It is a concession, that is the special circumstance before you, Ladies and Gentlemen. (4 RT 836.)

When Josephina's body was examined, there was no evidence of injury or trauma to her vaginal area. (3 RT 481.) The only sperm evidence present was matched to Abel Gutierrez, Josephina's husband. (2 RT 361-363.) Evidence showed that Josephina's blood was found on appellant's body, but the crime scene evidence suggested an imprint of a male penis that was found in the area of Josephina's back, which did not establish sexual intercourse or attempted intercourse which was a required element of rape necessary to prove the special circumstance and underlying offense to establish felony murder. (2 CT 293-297, 306, 3 RT 576-578.)

The prosecutor's reliance on appellant's statements to secure the special circumstance finding and to support the felony murder theory of murder demonstrates prejudice. (*People v. Wharton, supra,* 53 Cal. 3d 522, 598, *Chapman v. California, supra,* 386 U.S. 18, 24.) Because this testimony was so important to the prosecutor's argument, this court should also treat it as important. As the Supreme Court has put it: "There is no reason why we should treat this evidence as any less 'crucial' than the

prosecutor – and so presumably the jury – treated it." (*People v. Powell* (1967) 67 Cal.2d 32, 56-57, quoting *People v. Cruz* (1964) 61 Cal.2d 861, 868.) Furthermore, to the extent that appellant's statements were obtained as the result of coercion, "his conviction cannot stand." (*Mincey v. Arizona, supra*, 437 U.S. 385, 398.) Thus, appellant's conviction and the special circumstance finding should therefore have been reversed. The issue of whether a M*iranda* waiver may be implied when a juvenile defendant, after being advised of his rights, is not asked if he waives his rights and in response to the first question, he requests five minutes, asks for pain medication, and inquires about his father, and is denied all three, is an important question of law, requiring review by this Court. (Rule 8.500.)

CONCLUSION

Review is necessary to ensure uniformity and settle important questions of law regarding imposition of LWOP sentences in juvenile cases and application of the Miranda rule. For all the reasons stated above, review should be granted.

October 30, 2012

Respectfully submitted,

/s/

JEAN MATULIS
Attorney for Appellant
LUIS ANGEL GUTIERREZ

CERTIFICATE OF COMPLIANCE

I hereby certify that the Petition for Review contains 9522 words according to the word count of the WordPerfect computer program used to prepare the document.

Dated: October 30, 2012

/s/

JEAN MATULIS

Attorney for Appellant

Filed 9/24/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LUIS ANGEL GUTIERREZ, Defendant and Appellant.	2d Crim. No. B227606 (Super. Ct. No. 2008011529) (Ventura County)

During the course of a sexual assault, Luis Angel Gutierrez murdered his aunt by stabbing her 28 times. A jury convicted him of first degree murder with the special circumstances finding that the murder was committed during the commission of a rape or attempted rape. (Pen. Code, §§ 187, subd. (a); 189, 190.2, subd. (a)(17)(C); 261.)[1]. The jury found that he personally used a deadly weapon (§ 12022, subd. (b)(1)) and was over 14 years of age at the time of the offense (Welf. & Inst. Code, § 602, subd. (b)(1)). Appellant was sentenced to life without possibility of parole (LWOP) plus one year on the weapon enhancement (§ 12022, subd. (b)(1)).

He appeals contending that the trial court erred in finding that he waived his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].) He also challenges the LWOP sentence. We affirm.

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[1] All statutory references are to the Penal Code unless otherwise stated.

Facts

The victim, Josefina Gutierrez (Josefina), lived in Simi Valley with her husband, sons, and other relatives including appellant.

At 4:20 a.m., on March 16, 2008, Josefina's husband, Abel Hernandez, went to work leaving Josefina asleep in their bed. Appellant took his shoes off and entered the house. Abraham Gutierrez, Abel's nephew, heard someone open Josefina's bedroom door which was unusual because Josefina normally slept in on Sundays. Thereafter, he saw appellant in the kitchen. Appellant's right hand was bleeding. Appellant tried to hide the injury with his jacket sleeve and said that he hurt his hand in a fight. Appellant left about five minutes later.

Jose Luis Mendoza, Josefina's brother, saw blood on the floor and the bedroom door ajar. Josefina was naked, face down on the floor with her legs spread apart. She had a large knife protruding from her back. There were fresh bruises on her face and body and stab wounds to the back, shoulder, hands, chest, face, and neck.

Appellant admitted himself to Los Robles Hospital. Thereafter, he spoke to the police. He said that a Hispanic gang member stabbed him in the hand at a party in Moorpark. A sexual assault nurse examiner found blood on the head of appellant's penis. Josefina's DNA was on his scrotum. Appellant had dried blood all over him.

A crime scene investigator found bloody handprints on Josefina's thighs, blood on the bedroom walls and ceiling, and blood spatter and smears in the bathroom. Appellant's DNA was on Josefina's perianal area, her buttocks and inner thighs, and on the bathroom wall by the light switch. Officers searched appellant's bedroom and found bloody socks, shoes, and jeans. Blood was on the outside and inside of appellant's car and a bloodstained dress shirt was in the car.

Appellant underwent hand surgery and was hospitalized. He was released to the custody of the Simi Valley Police Department three days later on March 19, 2008. Officer Lincoln Purcell read appellant his *Miranda* rights in the Spanish language. Appellant nodded his head up and down after each advisement indicating he understood his rights. Officer Purcell did not, however, expressly ask appellant to waive the

M*iranda* rights. Nevertheless, appellant showed a willingness to discuss the case and did so for over two hours. Appellant gave conflicting accounts of what happened.

Appellant told Officer Purcell that he attended a birthday party at Erika Gutierrez's house and purchased methamphetamine. After leaving the party 10 to 15 men beat and stabbed him. Appellant sustained a cut to his hand and walked home.

Officer Purcell told appellant that the police had this house under surveillance because of prior drug transactions. He told appellant that the police did not see a group of men harm anyone. Purcell then changed the subject and asked why his blood was in Josefina's bedroom.

Appellant changed his story and said that he arrived home at 5:30 a.m. and knocked on Josefina's bedroom door. The two argued and Josefina attacked him with a knife. Appellant grabbed the knife but Josefina cut him and then stabbed herself.

Officer Purcell told appellant that Josefina was stabbed in the back multiple times before she was stabbed in the stomach. Appellant said that Josefina stabbed herself to falsely incriminate him. After Josefina cut his hand, he grabbed the knife and stabbed her in the back two times. Appellant denied stabbing Josefina in the face or neck or having sex with her.

Officer Purcell asked why blood was on appellant's penis. Appellant said that Josefina sexually assaulted him, took off her nightshirt, and had appellant remove her bra. Appellant fell on top of her after she pulled his pants down. Appellant did not know if his penis penetrated her vagina but he did recall pulling his pants back up and stabbing Josefina before leaving.

Implied Miranda Waiver

Appellant contends that the trial court erred in finding that he impliedly waived his *Miranda* rights (*Miranda v. Arizona, supra,* 384 U.S. 436 [16 L.Ed.2d 694]). The *Miranda* admonition and two-hour-forty-minute police interview was videotaped. The trial court reviewed a DVD and transcript of the interview and found that appellant, "by his comments, by his -- by the language he used, by the body language that he demonstrated that he executed a free and deliberate choice to discuss the issue with the

police officers. It was obvious to me that he understood his rights based on his responses to the questions, [and] based on his behavior and his conduct. Based on his indication to stop the interview for the five-minute period, he demonstrated to me satisfactorily that he understood that he was in control of the situation, and the officers complied with his request. [¶] So it's obvious to me that the *Miranda* warnings were properly given, that the Defendant understood the rights that he was given and that he chose to discuss the matter with the police officers, notwithstanding those rights that were given to him."

The trial court considered appellant's age and physical condition and that appellant was "on no medication that we can tell . . . . He's fully conscious. He's alert. And even though he requests the pain medication. . . , there wasn't anything I saw on the DVD or any testimony . . . that would indicate to me that he was debilitated or otherwise in such pain that his free will was overcome by his physical condition. [¶] And finally, on the issue of his age, notwithstanding the officer's belief, and rightfully so, that he was over the age of 18, the Court still . . . has considered his actual true age and his intelligence and his capacity to understand as demonstrated both in the DVD as well as the transcript and through the testimony of the officers that there wasn't anything about his age or his request for his father that in this Court's view overcomes his free will in executing an implied waiver." [2]

On appeal, we defer to the trial court's factual findings which are supported by substantial evidence and independently determine whether the statement was obtained in violation of *Miranda*. (*People v. Nelson* (2012) 53 Cal.4th 367, 380 (*Nelson*).) "'[A] suspect who desires to waive his *Miranda* rights and submit to interrogation by law enforcement authorities need not do so with any particular words or phrases. A valid waiver need not be of predetermined form, but instead must reflect that the suspect in fact

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[2] Appellant was 17 years old (date of birth February 2, 1991) when interviewed. The officers, however, found a resident alien card listing appellant's date of birth as February 2, 1989 and believed appellant was an adult. Appellant said he was 19 years old at the hospital and when he was booked.

knowingly and voluntarily waived the rights delineated in the *Miranda* decision. [Citation.] We have recognized that a valid waiver of *Miranda* rights may be express or implied. [Citations.] A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. [Citations.]'" (*People v. Hawthorne* (2009) 46 Cal.4th 67, 86.)

After appellant was released from the hospital, he was advised of his *Miranda* rights in the Spanish language. Officer Purcell read from a *Miranda* card and, after each advisement, looked at appellant and asked if he understood. Appellant nodded his head up and down in the affirmative, indicating that he understood each right.

Officer Purcell asked how appellant cut his hand. Appellant said, "I don't feel good right now" and asked for a five-minute break. Officer Purcell and his partner, Detective Jay Carrott, honored appellant's request and stopped the questioning.

Appellant broke the silence a minute later and asked for a pill. Officer Purcell explained that the police were not authorized to administer medication and confirmed that the hospital had not prescribed any medication when it released appellant.[3] Appellant said that his hand was "stinging" but agreed to proceed with the interview.

Appellant contends that he had just been released from the hospital, was in pain, and was unable to waive his *Miranda* rights. The DVD shows to the contrary. Appellant wanted to speak to the officers and used his bandaged hand to open a water

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[3] Appellant complains that the officers did not give him a full five-minute break. Appellant confuses *Miranda* waiver with the invocation of a defendant's right to remain silent. " 'Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.' [Citation.]" (*People v. Martinez* (2010) 47 Cal.4th 911, 951.) Appellant waived his *Miranda* rights and asked for a break. A minute later he asked for a pill and said, "Where is my father, is he here?" Appellant did not invoke his right to remain silent nor was Officer Purcell under any obligation to cease questioning. (*Ibid.*; see *Berghuis v. Thompkins* (2010) 560 U.S. at p. ___ [176 L.Ed.2d at p. 1115].)

bottle, point to a diagram, rub his face, and make stabbing gestures. Appellant demonstrated what took place between Josefina and him by standing up and identifying their body positions. At another point in the interview, he stepped over to a doorway in the interrogation room and identified the bloody pants and socks found in his bedroom closet. Following the interview, appellant agreed to accompany the officers to the house and do a crime scene walk-through which was videotaped. As appellant walked through the bloodstained bedroom, he was calm, paused at the bathroom door, and asked Officer Purcell if his socks would get stained by the blood.

The DVD depicts an alert young man who is sober, calm, and is responsive to the officers' questions. There is no evidence that the hand injury clouded appellant's judgment or impaired his decision to waive his rights. (See, e.g., *People v. Breaux* (1991) 1 Cal.4th 281, 299-301 [*Miranda* rights waived in hospital directly following emergency treatment for gunshot wounds and injection of morphine to relieve pain]; *People v. Perdomo* (2007) 147 Cal.App.4th 605, 616-617 [defendant waived *Miranda* rights while in intensive care and medicated for pain].) Unlike the defendant in *Mincey v. Arizona* (1978) 437 U.S. 385, 398-401 [57 L.Ed.2d. 290, 304-305] who suffered unbearable pain and lost consciousness during the police interview, appellant was lucid, asked questions, and interacted with the officers.

Appellant complains that he was not provided a written copy of the *Miranda* warnings but a verbal admonition is sufficient. Officer Purcell read from a *Miranda* warning advisement card and asked whether appellant understood each right. Appellant nodded his head up and down in the affirmative, looked Officer Purcell in the eye, and by his gestures and conduct indicated that he was waiving his rights and wanted to talk to the officers.

He also complains that Officer Purcell failed to obtain an express verbal or written waiver of each *Miranda* right. As discussed in *Berghuis v. Thompkins supra*, 560 U.S. at p. __ [176 L.Ed.2d at p. 1112], the waiver may be implied. A defendant, by his words and conduct, may make an implied waiver of his *Miranda* rights by

acknowledging that he understands the rights read and answering questions. (*People v. Whitson* (1998) 17 Cal.4th 229, 250.)

Appellant contends that he invoked his right to counsel/remain silent when he asked about his father. Appellant said, "I wish my Dad could be here with me," and "Where is my father?" but did not ask the officers to stop the interview. The trial court found that "never in conjunction with discussing his father did [appellant] actually ask to terminate [the interview] and talk to his father. In effect, he doesn't ask to talk to his father. He makes statements such as, 'I wish he were here' or 'where's my father?'"

In *People v. Lessie* (2010) 47 Cal.4th 1152, our Supreme Court held that a minor's request "to make a phone call to my dad" (*id.*, at p. 1159) did not render his statements inadmissible (*id.*, at pp. 1169-1170). "Defendant's confession would be subject to exclusion under the federal Constitution if the totality of the relevant circumstances demonstrated that his purpose in asking to speak with his father was to invoke his Fifth Amendment privilege. (See, e.g., *Fare* [*v. Michael C.* (1979)] 442 U.S. 707, 725. . .) . . . Defendant did not say, for example, that he wanted to speak with his father before answering questions or wanted his father to call an attorney on his behalf. Nor did defendant hesitate at any point to answer the detectives' questions." (*Id.*, at p. 1170.)

The same analysis applies here. Appellant did not say that he wanted to stop the interview, wanted his father to be present, or wanted his father to call an attorney. There is no evidence that the officers misled appellant or that appellant wanted to stop the interview.[4] "'. . . 'Faced with an ambiguous or equivocal statement, law

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[4] Midway through the interview, appellant was shown a pair of bloody pants found in his closet. Appellant asked, "[D]oes my father know that we are here?" Officer Purcell responded, "Oh, I don't know. The truth is I don't know."

Appellant continued answering questions and said, "I would like to see my dad," and that his father was working at "Marie Calendar's." Officer Purcell replied, "Okay. We can communicate to him, we can get in touch with your dad, but before doing this, we want to understand like how this happened. So that we can also explain it to your dad. Because your dad is going to have a difficult time understanding this. *Okay*?"

enforcement officers are not required . . . either to ask clarifying questions or to cease questioning altogether." [Citations.]' [Citations.]" (*People v. Scott* (2011) 52 Cal.4th 452, 481.)

In *People v. Nelson*, *supra*, 53 Cal.4th 367, a 15-year-old charged with murder and burglary waived his *Miranda* rights and asked to speak to his mother. Relying on *Davis v. United States* (1994) 512 U.S. 452, our Supreme Court held that the defendant's request to speak to his mother was not sufficiently clear to require cessation of the interrogation. (*Nelson*, *supra*, at p. 372.) Consistent with *Davis v. California*, *supra*, the court held that once a juvenile suspect has waved his or her *Miranda* rights, "any subsequent assertion of the right to counsel must be articulated 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. [Citation.] This standard likewise applies to assertions of the right to remain silent. [Citation.]" (*Nelson*, *supra*, 53 Cal.4th at pp. 371-372.)

The court in *Nelson* explained: "There are important practical and policy reasons supporting this rule. When the interrogating officers 'reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity," . . . because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.' [Citation.] Likewise, in the right to silence context, '[i]f an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong."' [Citation.] In such circumstances, suppression of a voluntary confession 'would place a significant burden on society's interest in prosecuting criminal activity.' [Citation.]" (*Nelson*, *supra*, 53 Cal.4th at pp. 377-378.)

The trial court considered appellant's age, experience, education, background, and intelligence, and whether appellant had the capacity to understand the *Miranda* warnings and the consequences of waiving those rights. (*Fare v. Michael C.*,

supra, 442 U.S. at pp. 724-725 [61 L.Ed.2d at p. 212]; *People v. Lessie*, *supra,* 47 Cal.4th at p. 1169.) We have reviewed the DVD and transcript of the interview and, like the trial court, conclude that appellant freely and voluntarily waived his *Miranda* rights.

Appellant argues that the suspect's age is an important factor in determining whether he voluntarily waived his *Miranda* rights. It is settled that a minor has the capacity to waive his *Miranda* rights and make a voluntary confession. (*People v. Lessie*, *supra*, 47 Cal.4th at pp. 1166-1167.) Appellant was 17 years old but said he was 19. (*Ante*, fn 2.) The officers believed him, and for good reason. Appellant looks and acts like an adult on the DVD.

The record is devoid of evidence that appellant, because of his age, education, intelligence, or medical condition did not understand the rights he was waiving or what the consequences would be if he talked to the officers. (See *Fare v. Michael C.*, *supra*, 422 U.S. at pp. 726-727 [61 L.Ed.2d at pp. 213-214]; *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 579.) Based on the totality of the circumstances, it is clear that appellant knowingly and voluntarily waived his *Miranda* rights. (*People v. Lewis* (2001) 26 Cal.4th 334, 383-384; see, e.g., *United States v. Doe* (9th Cir 1995) 60 F.3d 544, 546 [officer's unrebutted testimony established that juvenile knowingly and voluntarily waived his *Miranda* rights].)

Harmless Error

Assuming, arguendo, that appellant's statement should have been excluded, any error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [113 L.Ed.2d 302, 332]; *People v. Cunningham* (2001) 25 Cal.4th 926, 994.) Appellant's statement to the police did not explicitly admit guilt, and confirmed what was already established by the physical evidence. "Without defendant's statements, the physical evidence still established defendant's guilt as to all the crimes charged and the special circumstances alleged." (*People v. Davis* (2009) 46 Cal.4th 539, 599.)

Abraham Gutierrez and Luis Mendoza saw appellant's cut hand and blood outside Josefina's bedroom door. Blood was in appellant's car and on his dress shirt in the car. Appellant left Josefina nude on the bedroom floor with her legs spread apart and

a knife protruding from her back. Josefina was covered with bruises and stab wounds, many of which were inflicted after appellant removed her nightgown and bra.

Appellant asserts that there was no sperm or trauma to the victim's vagina to support the finding that he murdered Josefina during the commission of a rape or attempted rape. The coroner, however, testified that only 30 percent of adult sexual assault victims have visible injuries to their genitalia. The absence of trauma or injury to Josefina's vagina did not rule out rape or attempted rape. (See, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1130-1132 [physical evidence of a sexual assault is not a prerequisite to finding intent to rape].) Nor does attempted rape require sexual penetration. (*People v. Scott*, *supra*, 52 Cal.4th at p. 488.)

The trial court found that the violence inflicted "is really inexplicable. And there isn't, other than the rape special circumstance, there isn't any rationale explanation as to how [appellant] could have found himself in this position." We concur. The assailant had no reason to disrobe Josefina, drag her from the bathroom to the bedroom, or touch her inner thighs unless it was for a sexual purpose. It was uncontroverted that the knife wounds were inflicted before and after the nightgown was removed and that Josefina suffered defensive wounds trying to protect herself. Blood was under appellant's penis foreskin and Josefina's DNA was on appellant's scrotum. Blood, long hairs, and fibers were on appellant's feet and between his toes, and dried blood was on his legs, hands, head, bracelet, and ears.

Appellant's palm print was on the bathroom floor and his sock imprint was on the bathroom door, consistent with the prosecution's theory that appellant straddled Josefina and dragged her out of the bathroom as she kicked the floor. Josefina's nightgown and bra were in the bathroom and her panties were in the bedroom. Appellant's DNA was on Josefina's perianal area and thighs, and on the bathroom wall next to the light switch. Forensic evidence showed that appellant spread Josefina's legs, leaving bloody handprints and friction ridges on her inner thighs. A blood spatter expert testified that the wide blood swipe on Josefina's upper buttocks and back was consistent with an erect male penis.

Appellant's statements to the police were not essential to the People's case. His statements were overshadowed by grisly physical and forensic evidence that he murdered Josefina during a violent sexual assault. Any error in admitting appellant's police station statement was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23-24 [17 L.Ed.2d 705, 710-711]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1314.)

Life Without Possibility of Parole

Appellant argues that his LWOP sentence violates the Eighth Amendment and is cruel and unusual punishment. Appellant, however, failed to object to the sentence, forfeiting his right to challenge the sentence as cruel and unusual punishment. (*People v. Russell* (2010) 187 Cal.App.4th 981, 993; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.)

On the merits, appellant makes no showing that the sentence is grossly disproportionate to the severity of the crime. (*Solem v. Helm* (1983) 463 U.S. 277, 288 [77 L.Ed.2d 637, 647-648] (*Solem*); *People v. Dillon* (1983) 34 Cal.3d 441, 477-478.) In evaluating proportionality, courts consider (1) the nature of the offense and the offender, (2) punishments for more serious offenses in the same jurisdiction, and (3) punishments for the same crime in other jurisdictions. (*Solem*, *supra*, at pp. 290-292 [77 L.Ed.2d at pp. 649-650]; *In re Lynch* (1972) 8 Cal.3d 410, 425-427.) "[A]pplication of a proportionality analysis to reduce a first degree felony-murder conviction must be viewed as representing an exception rather than a general rule." (*People v. Munoz* (1984) 157 Cal.App.3d 999, 1014.) Murder is a violent and serious crime and presents the highest level of danger to society. (*People v. Em* (2009) 171 Cal.App.4th 964, 972-973.)

Here the murder was extremely brutal. Appellant repeatedly stabbed Josefina in the course of a violent sexual assault. He expressed no remorse and told the police (three days after the murder) that Josefina sexually assaulted him. After the interview, he accompanied the officers to the house and calmly walked through the bloodstained bedroom.

Nor has appellant shown that the LWOP sentence is so grossly disproportionate to the crime "'. . . that it shocks the conscience and offends fundamental notions of human dignity,' thereby violating the prohibition against cruel and unusual punishment of the Eighth Amendment of the federal Constitution or against cruel or unusual punishment of article I, section 17 of the California Constitution [Citations.]" (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1042.) Under the Eighth Amendment, a life sentence consistent with state law is unconstitutional only in that "'rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross, disproportionality.' [Citation.]" (*Ewing v. California* (2003) 538 U.S. 11, 30 [155 L.Ed.2d 108, 123].) That is not the case here.

Roper/Graham

Citing *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1] (*Roper*), and *Graham v. Florida* (2010) __ U.S. ___ [176 L.Ed.2d 825] (*Graham*), appellant argues that juvenile offenders are less culpable than adults who commit violent crimes because juvenile offenders lack maturity, perspective, judgment and self-discipline. The holding of *Roper* is that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." (*Roper*, *supra*, at p. 578 [161 L.Ed.2d at p. 28].) The decision in *Graham* is that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." (*Graham*, *supra*, at p. __ [176 L.Ed.2d at p. 850].) *Roper* and *Graham* do not prohibit imposition of a life sentence where the juvenile commits a homicide. (See, e.g., *Harris v. Wright* (9th Cir. 1996) 93 F.3d 581, 583-585 [concluding that LWOP sentence not unconstitutionally disproportionate to 15-year-old defendant convicted of murder].)

Appellant has not demonstrated that his punishment is grossly disproportionate to punishments for more serious offenses in California or punishments for similar offenses in other jurisdictions. (*In re Lynch*, *supra*, 8 Cal.3d at pp. 425-427; *Solem*, *supra*, 4363 U.S. at pp. 291-292 [77 L.Ed.2d at pp. 649-650].) Only six states forbid LWOP sentences for juvenile offenders and seven states permit LWOP sentences

for juvenile offenders. (*Graham*, *supra*, __ U.S. at p. __, appens. II & III [176 L.Ed.2d at p. 852, appens. II & III].) Courts in this state and other states have held that a LWOP sentence does not constitute cruel and/or unusual punishment where the juvenile offender is convicted of felony murder. (See *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1147; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 17 [50 years to life not cruel and unusual punishment for 14-year-old convicted of aiding and abetting gang-related murder]; *People v. Launsburry* (Mich 1996) 551 N.W.2d 460, 463-464; *Commonwealth of Pa. v. Carter* (Pa. Super. 2004) 855 A.2d 885, 891-892.)

In *People v. Caballero* (2012) 55 Cal.4th 262 our Supreme Court recently held that a 110-year-to-life sentence imposed on a juvenile convicted of nonhomicide offenses (three gang-related attempted murders) was the functional equivalent of a life sentence without the possibility of parole and contravenes *Graham. Caballero* is inapposite because appellant was convicted of a special circumstances felony murder and sentenced pursuant to section 190.5, subdivision (b) which vested the tiral court with the discretion to impose a 25-yer-to-life sentence.

Miller

The United States Supreme Court, in *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455] (*Miller*), recently held that mandatory LWOP sentences for juvenile homicide offenders violate the Eighth Amendment's prohibition on cruel and unusual punishment. In *Miller* (14-year-old convicted of arson-murder) and a companion case (*Jackson v. Hobbs* [14-year-old convicted of felony-murder]), state law mandated a LWOP sentence even if the sentencing court believed that a lesser sentence was more appropriate. (*Id.*, at p. ___ [132 S.Ct. at p. 2460.) The *Miller* court stated that "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth

Amendment's ban on cruel and unusual punishment." (*Id.*, at p. __ [132 S.Ct. at p. 2475].)

Unlike *Miller*, appellant's LWOP sentence was not mandatory. Appellant was sentenced pursuant to section 190.5, subdivision (b) which provides that a juvenile defendant 16 years of age or older who is convicted of first degree, special circumstance murder *may be* sentenced to life without possibility of parole.[5] (*People v. Guinn*, *supra*, 28 Cal.App.4th at pp. 1141-1142.) The statute does not require a mandatory LWOP sentence and vests sentencing courts with the discretion to sentence the defendant to a term of 25 years to life with possibility of parole. It does not violate the proscription against cruel or unusual punishment. (*Id.*, at p. 1143-1144.)

The trial court, in sentencing appellant, stated it was "concerned throughout the trial about the defendant's age and the age of which he committed this horrific crime. [¶] And I have considered all of the legal options that are limited for the Court with this conviction, . . . and there are a number of things about the crime itself that in my view warrants life without the possibility of parole, notwithstanding the defendant's age. [¶] First and foremost is really just the true horror that was involved and the amount of violence that was inflicted on Josefina is really inexplicable. And there isn't, other than the rape special circumstance, there isn't any rational[] explanation as to how the defendant could have found himself in that position. [¶] He has devastated this family and her children and her husband, and there is really no amount of time that could be imposed as punishment that would repay the damage he has caused, not just to her inner circle but to the community as well and the community of her family. [¶] . . .[¶] So I thought -- I have thought long and hard about what punishment is appropriate and I am

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[5] Section 190.5, subdivision (b) states: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole *or, at the discretion of the court, 25 years to life.*" (Italics added.)

absolutely convinced at this stage of the proceedings that life without the possibility of parole is the only thing that the Court can do that could redress the amount of violence that was inflicted in this case."

Section 190.5, subdivision (b) "requires 'a proper exercise of discretion in choosing whether to grant leniency and impose the lesser penalty of 25 years to life for 16-year-old or 17-year-old special circumstance murderers. The choice whether to grant leniency of necessity involves an assessment of what, in logic, would mitigate or not mitigate the crime. . . .'" (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089.)

The trial court was aware of its discretion and declined to impose a more lenient sentence. Remanding for resentencing in light of *Miller* would be a futile exercise. Appellant argues that a categorical ban of LWOP sentences for juveniles is required under the Eighth Amendment, but no court has so held.

Appellant's remaining arguments have been considered and merit no further discussion.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

PROOF OF SERVICE BY MAIL

People v. Luis Angel Gutierrez
California Court of Appeal, Second App. Dist., Div. Six, No. B227606
Ventura Superior Court No. 2008011529

I am over eighteen years old and not a party to this action, and a member of the State Bar of California. My business address is P.O. Box 1237, Cambria, CA 93428. On October 30, 2012, I served the following:

Petition for Review

by mailing true and correct copies, postage pre-paid, in United States mail to:

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I declare under penalty of perjury under the laws of California that the foregoing is true and correct. Executed at Cambria, CA on October 30, 2012.

/s/

Jean Matulis