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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
ANDREW L. MOFFETT,
Defendant and Appellant.

First Appellate District, Division Five, Case No. A133032
Contra Costa County Superior Court, Case No. 051378-8
The Honorable Laurel Brady, Judge

PETITION FOR REVIEW

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Respondent respectfully petitions for review of the decision of the Court of Appeal for the First Appellate District, Division Five. (Exhibit A.) The Court of Appeal issued its decision on October 12, 2012. The decision is published at 209 Cal.App.4th 1465. No petition for rehearing was filed. This petition is timely. (Cal. Rules of Court, rule 8.500(e).)

ISSUE PRESENTED

Does Penal Code section 190.5, subdivision (b), violate the prohibition on mandatory terms of life without parole for minors (*Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455])?

STATEMENT OF THE CASE AND FACTS

Penal Code section 190.5, subdivision (b), provides that the penalty for a defendant who was 16 or 17 years old when he committed special circumstance first degree murder "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 Court of Appeal has consistently interpreted this subdivision as making LWOP the "presumptive sentence," while also giving trial courts the discretion to impose the lesser term of 25 years to life. (See, e.g., *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089 [83 Cal.Rptr.3d 340, 358]; *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1145 [33 Cal.Rptr.2d 791, 799] ["Penal Code section 190.5 provides a presumptive penalty of LWOP for a 16– or 17–year–old special circumstances murderer ...."]; *People v. Blackwell* (2011) 202 Cal.App.4th 144, 154 [134 Cal.Rptr.3d 608, 617].)

Appellant was four days shy of his 18th birthday when he committed the crimes in this case. (17CT 4668 [probation officer's report indicates appellant's date of birth is April 27, 1987].) He was charged as an adult pursuant to Welfare and Institutions Code section 707, subdivisions (b), (d)(1). A five-count information charged him and codefendant Alexander

Hamilton with (1) first degree murder (Pen. Code, § 187, further statutory references are to this code unless otherwise stated), with three robbery special circumstances (§ 190.2, subd. (a)(17)(A)), a peace-officer special circumstance (§ 190.2, subd. (a)(7)), and as to Hamilton, a lying-in- wait special circumstance (§ 190.2, subd. (a)(15)); (2-4) second degree robbery (§§ 211, 212.5, subd. (c)); and (7) unlawful taking or driving a vehicle (Veh. Code, § 10851, subd. (a)). Counts 1 through 4 alleged that appellant personally used a firearm (§ 12022.53, subd. (b)). Counts 5 and 6 charged Hamilton with premeditated attempted murder (§§ 187, 664); and counts 1 through 6 alleged that Hamilton personally used a firearm (§ 12022.53, subd. (b)), intentionally discharged a firearm (§ 12022.53, subd. (c)), and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). (4CT 994–1000.)[1]

On August 13, 2007, the jury found defendants guilty as charged. It found the murder to be in the first degree. And it found all special circumstances and enhancements true. (14CT 3939–3941; 33RT 7296–7314.) On September 11, 2007, after a separate penalty trial, the jury returned a verdict of death as to Hamilton. (15CT 4235.) On November 2, 2007, the trial court entered a judgment of death. (16RT 4307–4314, 4324–4327.) On July 24, 2008, the trial court sentenced appellant to 24 years plus life without the possibility of parole (LWOP). (17CT 4655–4660; 34RT 7759–7764.)

On appellant's appeal from the judgment in case no. A122763, the Court of Appeal reversed the peace-officer special circumstance. The court

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[1] The Court of Appeal (No. A133032) granted appellant's request for judicial notice of the record in his previous appeal (No. A122763). References to Clerk's and Reporter's Transcripts with volume numbers are to the record in the first appeal. References to transcripts without a volume number are to the second appeal.

remanded for resentencing on counts two, three, and four, and affirmed in all other respects. On July 22, 2011, the trial court resentenced appellant to 24 years plus LWOP. (CT 108–109, 114–117; RT 73–78.)

On appellant's second appeal in this case, the Court of Appeal held that the presumptive LWOP sentence provided in section 190.5, subdivision (b), violates the Eighth Amendment as interpreted by *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455] (*Miller*). The Court of Appeal vacated the sentence and remanded the matter so the trial court could resentence appellant to either 25 years to life or LWOP.

REASONS FOR REVIEW

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT IN THE COURT OF APPEAL

The People respectfully request review of the Court of Appeal's opinion "to secure uniformity of decision or to settle an important question of law." (California Rules of Court, rule 8.500(b)(1).)

The United States Supreme Court in *Miller v. Alabama*, *supra*, 567 U.S. __ [132 S.Ct. 2455] (*Miller*) recently held a mandatory LWOP sentence violates the Eighth Amendment right of minors because the sentence does not encompass consideration by the trial court of "their age and age-related characteristics and the nature of their crimes." (*Miller*, *supra*, 132 S.Ct. at p. 2475.)

On September 24, 2012, the Second District of the Court of Appeal held that because section 190.5, subdivision (b), gives trial courts the discretion to impose a term of 25 years to life with the possibility of parole, it is not a mandatory LWOP term within the ambit of *Miller*. (*People v. Gutierrez* (2012) 209 Cal.App.4th 646, 659 [147 Cal.Rptr.3d 249, 260] (*Gutierrez*), petn. for review pending, petn. filed Nov. 2, 2012, S206365.)

Less than three weeks later, the First District of the Court of Appeal came to the opposite conclusion in the present matter and did not address

Gutierrez. The court held that "[a] presumption in favor of LWOP, such as that applied in this case, is contrary to the spirit, if not the letter, of *Miller*. . . ." (*People v. Moffett* (2012) 209 Cal.App.4th 1465 [148 Cal.Rptr.3d 47, 55] (*Moffett*).) It vacated the sentence and remanded so the trial court could resentence appellant without a presumption in favor of imposing LWOP.

This Court should grant review because the opinions of the First and Second Districts of the Court of Appeal conflict on the constitutionality of section 190.5, subdivision (b), under the Eighth Amendment. Unless the conflict is resolved, trial courts will not know what standard to apply when choosing between 25 years to life or LWOP for 16 and 17-year-old special-circumstance first degree murderers.

Resolution of the conflict by a grant of review would be dispositive of the present matter and similar non-final cases in a matter of significant importance in the administration of California's sentencing laws. Moreover, unless the decisional conflict is resolved, prisoners with final judgments of LWOP imposed pursuant to section 190.5, subdivision (b), can be expected to seek resentencing by asserting that *Miller* promulgated a new substantive rule that applies retroactively in California cases.

Lastly, review is necessary in light of the recent enactment of S.B. 9, which gives most minors sentenced to LWOP the right to petition for a resentencing hearing after 15 years. That new statutory right is retroactive and requires the trial court to exercise its discretion "in the same manner as if the defendant had not previously been sentenced." (§ 1170, subd. (d)(2)(E), eff. Jan. 1, 2013.) Trial courts will need to know what standard to employ when resentencing defendants who were sentenced pursuant to section 190.5, subdivision (b), more than 15 years ago.

Therefore, this Court should grant review to resolve whether the presumptive LWOP term in section 190.5, subdivision (b), violates *Miller*.

A. Review Is Necessary to Resolve the Conflict in Decisions on the Constitutionality of Section 190.5

The *Miller* court summarized its holding in the following passage:

> The two 14–year–old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change," *Graham v. Florida*, 560 U.S. ——, ——, ——, 130 S.Ct. 2011, 2026–2027, 2029–2030 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments."

(*Miller*, *supra*, 132 S.Ct. at p. 2460.)

Appellant was convicted of special-circumstance first degree murder. The trial court twice sentenced appellant to LWOP pursuant to section 190.5, subdivision (b), recognizing its discretion to impose a term of 25 years to life. It found no compelling reason to depart from the presumptive LWOP term.

Appellant's circumstances plainly differ from those of the defendants in *Miller*. Those differences are highly significant to the Eighth Amendment issue. First, the 14-year-old defendants in *Miller* committed their crimes when they were substantially younger than appellant—who was literally days away from his 18th birthday. Second, the sentences invalidated in *Miller* were imposed by a court that lacked authority to give a sentence other than LWOP. By contrast, appellant was sentenced under

section 190.5, subdivision (b), which authorized the trial court to impose a life term with the possibility of parole. Third, unlike the sentencing court in *Miller,* appellant's sentencing authority was allowed to consider whether his "youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate," and, if it so concluded, it was free to impose that lesser sentence. (*Miller, supra*, 132 S.Ct. at p. 2460.)

"Despite that statutory preference [for LWOP], 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. The factors listed in [former] rules 421 [now 4.421] and 423 [now 4.423], implementing the determinate sentencing law, do not lose their logical relevance to the issue of mitigation merely because [this is not] a determinate sentencing matter.' (*People v. Guinn* [1994] 28 Cal.App.4th [1130,] 1149, 33 Cal.Rptr.2d 791.)" (*People v. Ybarra, supra*, 166 Cal.App.4th at p. 1089, footnotes omitted.)

Unlike the law struck down in *Miller*, section 190.5, subdivision (b), expressly authorizes a life term with the possibility of parole. Not only was the trial court allowed to consider that sentence in this case, the court expressly did consider it. The trial court commenced the pronouncement of sentence by stating, "One of the central issues today is whether or not the Court will exercise discretion pursuant to Penal Code Section 190.5 and deviate from the statutory requirement of life without the possibility of parole and sentence Mr. Moffett to a . . . term of 25 years to life." (RT 73.)

Clearly, the trial court was well aware of its discretion not to impose LWOP. (See § 190.3, subd. (i).) It was likewise aware of its authority to

take appellant's youth into consideration. The trial court expressly considered appellant's age, the nature of the crimes, and mitigating and aggravating factors. (RT 75–77.) It also complied with *Miller*'s requirement that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." (*Miller*, *supra*, 132 S.Ct. at p. 2475.) Appellant was allowed to speak directly to the trial court. (RT 54–55.) Defense counsel argued extensively for the lesser sentence, emphasizing that appellant was not the actual killer and did not intend to kill the victim. (RT 62–73.) Counsel asserted: "[C]ompared to the adult murder[er], a juvenile who did not intend to kill has a twice diminished moral culpability." (RT 68.)

Noting that appellant "was slightly under eighteen years old at the time," the trial court concluded "his actions on that day, coupled with his criminal history, do not support, in my opinion, this Court exercising discretion and sentencing him to" the lesser term. (RT 77.) Numerous aggravating factors convinced the trial court that LWOP was the appropriate sentence: (1) Appellant held a gun to cashier Rima Bosso's head and threatened to kill her. As a result, she was fearful night and day, and the event "changed her life profoundly and forever." (RT 75.) (2) The two bank robbery victims also suffered after the robberies. (*Ibid.*) (3) Officer Lasater's death was a traumatic event for both his family and his community. (RT 76.) (4) Appellant was an active and aggressive participant in the crimes leading up to the shooting. (*Ibid.*) (5) Appellant's juvenile record contained four entries, including assault with a deadly weapon. (*Ibid.*) (6) Appellant's "performance on probation was marginal at best." (*Ibid.*) And (7), appellant's actions "were not those of an irresponsible child. They were the very adult, very violent acts of a young man. . . ." (RT 77.)

Despite the fact that the trial court expressly exercised its discretion not to impose a sentence of life with the possibility of parole, the First District of the Court of Appeal found the LWOP sentence in this case violates *Miller*'s prohibition of *mandatory* LWOP terms. (*Moffett*, *supra*, 148 Cal.Rptr.3d at p. 55.) The Court of Appeal overreached in its interpretation of *Miller*. Indeed, *Miller* cites section 190.5, subdivision (b), as an example of one of the "[f]ifteen jurisdictions [that] make life without parole *discretionary* for juveniles." (*Miller*, *supra*, 132 S.Ct. at p. 2471, fn. 10, italics added.) The high court's reference to the California statute as a discretionary statute, even if deemed to be dicta, refutes the Court of Appeal's opinion that section 190.5, subdivision (b), "is contrary to the spirit, if not the letter, of *Miller*. . . ." (*Moffett*, *supra*, 148 Cal.Rptr.3d at p. 55; see *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169 [78 Cal.Rptr.2d 819, 822] ["Even if properly characterized as dictum, statements of the Supreme Court should be considered persuasive."].) The "letter" of *Miller* shows section 190.5, subdivision (b), is not considered by the Supreme Court to be a mandatory LWOP sentencing statute for purposes of the Eighth Amendment. The Court of Appeal had no need to divine *Miller*'s "spirit."

In *Gutierrez*, the Second District of the Court of Appeal recognized the crucial distinction that justifies review of this case: "Unlike *Miller*, appellant's LWOP sentence was not mandatory. Appellant was sentenced pursuant to section 190.5, subdivision (b). . . . 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. ([*People v. Guinn*, *supra*, 28 Cal.App.4th] at pp. 1143–1144, 33 Cal.Rptr.2d 791.)" (*People v. Gutierrez*, *supra*, 209 Cal.App.4th at p. 659 [147 Cal.Rptr.3d at p. 260].)

B. Review Is Necessary in Light of the Unresolved Issue of Retroactivity of *Miller*

News sources estimate approximately 300 California prisoners may be serving LWOP for crimes committed when they were minors.[2] Presumably, many or most of these convictions are now final. Those prisoners can be expected to seek retroactive application of *Miller*. While a determination of whether *Miller* applies retroactively is beyond the scope of this case, *Moffett*'s invalidation of section 190.5, subdivision (b), might lead to fewer LWOP terms and, potentially, to retroactive application of *Miller*. (See *Schriro v. Summerlin* (2004) 542 U.S. 348, 351–352.)

Were this Court to grant review and reverse, *Moffett* would not provide a basis for resentencing—regardless of *Miller*'s retroactivity. Accordingly, this Court should grant review not only to resolve the proper interpretation of section 190.5, subdivision (b), in light of *Miller*, but to minimize litigation over *Miller*'s application to final judgments.

C. Review Is Necessary to Allow a Clear Standard in Resentencing Defendants Pursuant to Penal Code Section 1170, Subdivision (d) as Amended by S.B. 9

The Governor recently signed S.B. 9. The statute amends section 1170, subdivision (d), to allow most minors serving LWOP to petition the court to resentence to a term of life with parole after service of at least 15 years of the sentence. S.B. 9 is expressly retroactive to all defendants currently serving a juvenile LWOP sentence. However, it does not apply in cases where the victim was a peace officer.

Appellant was convicted of special-circumstance first degree murder of a peace officer. Therefore, the amendment to section 1170, subdivision (d), does not apply to his case. Nevertheless, the Court of Appeal's opinion

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[2] See <http://www.kpbs.org/news/2012/aug/27/new-hope-juveniles-sentenced-lwop>.

remains highly relevant to current and future juvenile LWOP prisoners who will petition for resentencing.

As amended, section 1170, subdivision (d)(2)(E), provides that resentencing will take place "in the same manner as if the defendant had not previously been sentenced."[3] In the case of defendants sentenced pursuant

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[3] Beginning January 1, 2013, section 1170, subdivision (d), will provide, in part:

> "(2)(A)(i) When 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.
>
> "(ii) Notwithstanding clause (i), this paragraph shall not apply to defendants sentenced to life without parole for an offense where the defendant tortured, as described in Section 206, his or her victim or the victim was a public safety official, including any law enforcement personnel mentioned in Chapter 4.5 (commencing with Section 830) of Title 3, or any firefighter as described in Section 245.1, as well as any other officer in any segment of law enforcement who is employed by the federal government, the state, or any of its political subdivisions.
>
> "(B) The defendant shall file the original petition with the sentencing court . . . .
>
> "(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. Victims, or victim family members if the victim is deceased, shall retain the rights to participate in the hearing ....
>
> "(J) This subdivision shall have retroactive application."

to section 190.5, subdivision (b), trial courts will have to decide whether or not the LWOP presumption should be applied to any resentencing.

Many of the reported 300 California prisoners serving LWOP terms for crimes committed as a minor presumably will have served 15 years of their sentence and be eligible to petition for resentencing on January 1, 2013. An expeditious resolution of the division in the Court of Appeal over the constitutionality of section 190.5, subdivision (b) is needed so that trial courts know whether to employ the LWOP presumption. Therefore, this Court should grant review so trial courts can be assured of using the correct standard when resentencing prisoners affected by S.B. 9.

CONCLUSION

For the reasons discussed above, petitioner respectfully requests that this Court grant review in this matter.

Dated: November 20, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3,234 words. (California Rules of Court, rule 8.504(d)(1).)

Dated: November 20, 2012

KAMALA D. HARRIS
Attorney General of California

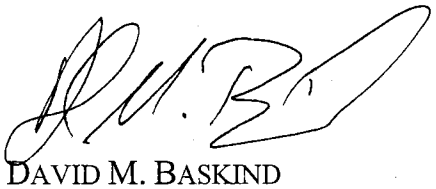

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EXHIBIT A

Filed 10/12/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
ANDREW LAWRENCE MOFFETT,
Defendant and Appellant.

A133032

(Contra Costa County Super. Ct. No. 051378-8)

Andrew Lawrence Moffett was 17 years old when he and an accomplice committed an armed robbery and his accomplice shot and killed a police officer during their attempt to escape. He appeals from a judgment sentencing him to life without the possibility of parole (LWOP) for his conviction of first degree murder with felony-murder special circumstances, arguing that the sentence amounts to cruel and unusual punishment. (Pen. Code, §§ 187, subd. (a); 189; 190.2, subd. (a)(17).)[1] We conclude that the case must be remanded for resentencing in light of the recent United States Supreme Court decision in *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*).

I. *BACKGROUND*

A. *Underlying Facts*

Elijah Moore stole a white Toyota Camry at appellant's request in exchange for some marijuana. On April 23, 2005, Moore delivered the Camry to appellant, who was with Alexander Hamilton. Later that same day, appellant and Hamilton drove the Camry to a Raley's supermarket in Pittsburg, which was having a grand reopening celebration.

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

They entered the store shortly before 5:47 p.m., wearing facial coverings and carrying semi-automatic handguns. Appellant ran to a checkout stand manned by Rima Bosso, pointed the gun at her head and demanded that she give him the money. Bosso initially thought it was a joke by one of her coworkers, but when she realized the situation was serious, she became flustered and could not get the register drawer to open. Appellant put his gun up against her left ear and repeatedly demanded the money, telling her "Come on, bitch. Come on, bitch. You're taking too fucking long." The drawer finally opened and Bosso put about $800 in a bag. Bosso closed her eyes because she thought appellant was going to shoot her, but when she opened them he had run away.

As appellant was robbing Bosso, Hamilton approached a Wells Fargo bank counter inside the Raley's, where bankers Anjila Sanehi and Adrianna Beaman were sitting at the counter helping customers. Hamilton stood between the two customers (one of whom was with her 12-year-old daughter) and pointed the gun back and forth between Sanehi and Beaman. He focused on Beaman, telling her, "Bitch, give me the money or I will shoot you." Beaman and Sanehi both put money in a bag that Hamilton was carrying.

Appellant and Hamilton ran out of the store, dropping some money just outside the exit. They got inside the Camry, sped out of the parking lot, and drove through a nearby residential neighborhood. A few minutes later, the car crashed into the back of a pickup truck parked on the street. Appellant and Hamilton got out of the car and a neighbor saw appellant (the taller of the two) drop and pick up a gun. Another neighbor started to chase them as they ran through a cul-de-sac, but he was warned off by the neighbor who had seen the gun. Appellant told the neighbor who was chasing them, "Stop or I'll cap you, motherfucker." Appellant and Hamilton continued running through the yards of several homes near the Delta de Anza Trail, scaling fences as they went.

Shortly after the robbery, police officers responded to the Raley's while others drove the likely escape routes. Information about the car crash and suspects running on foot near the Delta de Anza Trail was broadcast over the police radio. Pittsburg Police Officers Larry Lasater and John Florance drove their patrol cars as far as they could and

then got out and ran a couple of hundred yards down a path until they reached the trail. The officers surveyed the trail with their backs toward one another, with Officer Lasater looking east and Officer Florance looking west. Officer Lasater said, "Is that some one down there?" and Officer Florence turned around and saw a dark figure standing in some trees and greenery that was south of the trail. The figure disappeared into the greenery and Officer Lasater started running, calling out, "Black male, black sweatshirt." Officer Florance heard the sound of a fence being hopped and Officer Lasater quickly stopped and drew his weapon.

Officer Florance saw Officer Lasater walking heel-to-toe toward the area where the figure had disappeared, holding his gun out in front of him. Officer Lasater pointed his gun downward and shouted, "Show me your hands." Hamilton, who was lying down in the bushes, fired several shots at Officer Lasater, one of which shattered a vertebrae in his neck, and another of which went through his calf. Officer Lasater collapsed and ultimately died of the neck wound. A number of other officers came to the scene to assist in capturing the shooter and moving Officer Lasater from the area where he had fallen. Hamilton fired shots at two other officers until his gun ran out of ammunition, at which point he dropped his gun, crawled out of the grass, and was taken into custody.

Meanwhile, appellant had jumped the fence adjacent to the site of the shooting and had run through the backyard of Elizabeth Huyuck. Huyuck did not hear gunshots until after he ran through her yard. She noticed a dark sweatshirt caught on her backyard fence and some cash on the ground near the fence.

Another neighbor, Jerilynn Privratsky, heard the sound of a helicopter and started to go to her backyard via her garage to see what was happening. She saw a bare-chested young African-American man start to come into her garage and yelled, "No!" The man ran across the street. A number of other neighbors in the area also saw a young, shirtless African-American man running though the streets and backyards. Appellant, who is African American, was eventually discovered lying shirtless in a backyard in a fetal position under a tree. When police apprehended him (about 50 minutes after the first

robbery dispatch) he said "Don't kill me," and surrendered unarmed. At least one of his wrists was bleeding.

Larry Pitts lived in the neighborhood where appellant was apprehended but was out of town on the day of the robbery. When he returned home the following evening, he noticed that the gate to his yard was open and that some dirt had been pulled out of one of his flower pots. The next morning he checked the flower pot and discovered a handgun buried under about six inches of soil. The gun was a fully loaded automatic with a bullet in the chamber.

After the police recovered the gun from Pitts, they searched the backyard next door. Inside a garbage can they found a white plastic bag with $4027 cash and a black shirt. Blood matching appellant's DNA was discovered on the plastic bag containing the cash and on top of the garbage can lid. The black shirt also had a mixed sample bloodstain consistent with appellant's DNA, although that match was to a much lower probability (one in 1100 African Americans versus one in 4.9 quadrillion African Americans) than the other bloodstains.

It had been raining on the day of the robbery, and muddy shoeprints consistent with the shoes worn by appellant when he was arrested were discovered in many of the backyards in the area. Shoe prints consistent with Hamilton's shoes were found as well. Those shoe prints, along with damaged and muddied fences, a bloody palm print on a gate, and discarded latex gloves similar to those used in the robbery enabled the police to trace appellant's path of flight from the car crash to the backyard where he was arrested. One of appellant's shoeprints was found about 10 feet from the gun that Officer Lasater had dropped when he was shot.

Forensic testing showed that gunshot residue was present on appellant's hands after his arrest, which indicated that he had fired a gun, was near a gun when it was fired, or had handled a gun or other object contaminated with gunshot residue.

A cell phone recovered a few feet away from where Officer Lasater was shot was traced to appellant and contained Elijah Moore's telephone number. A dark hooded sweatshirt with blood on the left arm cuff was found on or near the fence adjacent to the

site of the shooting. The blood on the cuff of the sweatshirt appeared to correspond to a wound on appellant's wrist at the time of his arrest. No DNA type could be developed from the sample on the sweatshirt.

Appellant's teenage cousin, Brian Berry, was inside the Raley's when it was robbed. After he learned from his mother that appellant had been arrested for the robbery and shooting, he told police that he had heard one of the robbers saying, "Shut up, bitch," and thought the voice sounded like appellant's. Berry later denied that the robber's voice was familiar to him.

B. *Trial and Conviction*

The Contra Costa District Attorney charged appellant and Hamilton with first degree murder with special circumstances and other related charges, and sought the death penalty against Hamilton. Appellant was not eligible for the death penalty because he was under 18 at the time of the offenses. (See § 190.5, subds. (a) & (b).)

Following a joint trial with Hamilton, appellant was convicted of one count of first degree murder, three counts of second degree robbery and one count of driving a stolen vehicle. (Pen. Code, §§ 187, 211; Veh. Code, § 10851.) The jury also found true three felony-murder special circumstance allegations, one killing of a peace officer special circumstance allegation, and firearm use allegations as to the murder and robbery counts. (Pen. Code, §§ 190.2, subds. (a)(7) & (a)(17), 12022.53, subd. (b).) The jury returned the same verdict as to Hamilton and additionally found him guilty of two counts of attempted murder and found true a lying-in-wait special circumstance allegation. Appellant received a sentence of LWOP on the murder count, plus a 10-year enhancement for the firearm use allegation attached to that count. The court also imposed a consecutive sentence for one of the robbery counts and the attached firearm use enhancement, along with concurrent sentences on the remaining two robbery counts and enhancements. Sentence on the stolen vehicle count was stayed. Hamilton received the death penalty.

C. *First Appeal*

Appellant filed an appeal from the judgment in his case, raising a number of claims of trial and sentencing error. In an unpublished opinion, this court reversed the

peace officer special circumstance because, as the People conceded, there was no substantial evidence that appellant acted with an intent to kill. (*People v. Andrew Lawrence Moffett* (Nov. 9, 2010, A122763) [nonpub. opn.].) We remanded the case to the superior court for resentencing so the court could consider whether an LWOP sentence was appropriate in light of the reversal of one of the special circumstances, and additionally directed the court to correct sentencing errors on the robbery counts. (*Ibid.*) In light of this remand, we found it unnecessary to reach a claim by appellant that an LWOP sentence amounts to cruel and unusual punishment when imposed on a defendant who was a juvenile at the time of the offense.

D. *Sentencing Hearing on Remand*

Defense counsel filed a written sentencing statement arguing that appellant would be subjected to cruel and unusual punishment if the court imposed an LWOP sentence on remand. At the resentencing hearing, counsel argued that the court should consider reducing the first degree murder conviction to second degree murder, or alternatively, should impose a sentence affording appellant the chance to obtain parole at some future date. Counsel emphasized appellant's youth and his lack of any intent to kill, arguing that those circumstances resulted in a "twice diminished moral culpability." (See *Graham v. Florida* (2010) 560 U.S. ___ [130 S.Ct. 2011, 2027] (*Graham*) [describing culpability of juvenile convicted of non-homicide offense].) The prosecution argued that the court should again sentence appellant to LWOP on the murder count, and statements urging the imposition of an LWOP sentence were made by Officer Lasater's mother, widow, and brother, as well as one of his police officer colleagues.

The court prefaced its imposition of sentence by noting, "One of the central issues today is whether or not the court will exercise discretion pursuant to Penal Code section 190.5 and deviate from the statutory requirement of life without the possibility of parole and sentence Mr. Moffett to a determinate term of 25 years to life. We are not here today to debate the legality of the felony murder rule, nor can we engage in a philosophical discussion about its merits. It is the current state of the law in California.

[¶] The law also provides discretion for the trial court in certain limited circumstances such as this where the defendant in a capital case was a juvenile tried as an adult."

After pronouncing sentence on the robbery and stolen vehicle counts, the court turned to the murder conviction: "As for Count 1, Mr. Moffett was under the age of eighteen by just a few months at the time of this incident, thus the court has discretion regarding sentencing. [¶] . . . . [¶] Sometimes with the passage of time, people tend to forget or minimize the impact of incidents such as this. But the impact is just as vivid and continues for the victims and the victims' families and that doesn't change. [¶] The testimony of Rima Bosso, the robbery victim in Count 2, was extremely profound. She testified that the individual who was later identified as Mr. Moffett, took his gun, put it to her head and threatened to kill her with it. Not only did she see her own death that day, but she said for years afterwards and up until and as of the day she testified in the trial, she lived in a house where the curtains were pulled shut, the doors were locked. She didn't go out. She was fearful day and night. The trauma damaged her relationship with her family. It has changed her life profoundly and forever. She will never be the same. The fact that she was not physically harmed does not mean that she was not profoundly affected. Her testimony was very compelling. [¶] The other two robbery victims described similar experiences. I take all of this into account in determining the appropriate sentence.

"As for Officer Lasater's family, there's probably no way to describe in words the traumatic effect of this event, nor on the larger community that he was a part of. Mr. Moffett was very actively – he very actively participated in a series of events, starting with the theft of the car at his request by Elijah Moore; the takeover style robbery of the Raley's store and the bank window; the wild drive and crash in a nearby neighborhood; the confrontation of a resident where Mr. Moffett told him, 'Stop or I'll cap you'; and the shooting of Officer Lasater by Mr. Hamilton shortly thereafter. [¶] Mr. Moffett's role was not a passive role nor was he a peripheral player as compared with those factual scenarios described in the cases cited by the defense in their sentencing memorandum.

"I will note that although we don't know exactly where Mr. Moffett was when Mr. Hamilton shot Officer Lasater, the police found gun residue on Mr. Moffett's hands, meaning that even if he did not fire the weapon, he was close to it when it was fired; shoe prints matching Mr. Moffett's ten feet away from where Officer Lasater fell; and Mr. Moffett's cell phone a few feet away from Officer Lasater. [¶] The actions taken that day by Mr. Moffett are not those of someone who didn't know what was going on or who was led by others.

"I've also considered Mr. Moffett's juvenile criminal history. There were four entries, including a felony, 245(a)(1) Penal Code, assault with a deadly weapon. It was noted that his performance on probation was marginal at best. The juvenile justice system has infinitely more resources than the adult system. And it appears those resources were not sufficiently taken advantage of to choose a different path.

"The actions taken by Mr. Moffett on the day of this event were not those of an irresponsible child. They were the very adult, very violent acts of a young man who showed no regard for the impact of his actions on the victim in this case. I might add that his actions on that day also have had a profound effect and directly affected his own family and loved ones. Although Mr. Moffett was slightly under eighteen years old at the time, his actions on that day, coupled with his criminal history, do not support, in my opinion, this Court exercising [its] discretion and sentencing him to a determinate [sic] term of twenty-five years to life. I do not find that sentence appropriate in this particular case under the circumstances of this case, taking into account everything that is in front of me. [¶] On Count 1, I will sentence Mr. Moffett to life without the possibility of parole. I will impose the ten year enhancement for a weapon pursuant to Penal Code section 12022.53(b) to run consecutive to the other determinate sentences. . . ."

As to the remaining convictions, the court imposed a consecutive four-year "midterm" for the robbery in count 2 (victim: Rima Bosso) along with a consecutive ten-year enhancement under section 12022.53, subdivision (b). Four-year "middle" terms and ten-year enhancements were imposed for the robberies in counts 3 and 4 and ordered to run concurrently; sentence on the stolen vehicle count was stayed under section 654.

E. *Appeal from the Sentence on Remand*

In this appeal from the sentence imposed on remand, appellant filed an opening brief arguing that (1) the LWOP term amounted to cruel and unusual punishment under the state and federal Constitutions because he was a juvenile at the time, was not the actual shooter, and did not intend to kill (U.S. Const., 8th & 14th Amend.; Cal. Const., art. I, § 17); (2) the court abused its discretion when it declined to impose the lesser term of 25 years to life under Penal Code section 190.5, subdivision (b); and (3) the consecutive sentence imposed for the robbery conviction under count 2 was unauthorized because the court selected the "midterm of four years" whereas the sentencing range for second degree robbery is two, three, or five years.

After briefing was complete, the United States Supreme Court issued its decision in *Miller, supra*, 567 U.S. __ [132 S.Ct. 2455], in which it held that a mandatory LWOP sentence in a homicide case violates the Eighth Amendment's prohibition of cruel and unusual punishment when applied to a defendant who was less than 18 years of age at the time of the offense. In a supplemental brief discussing the effect of the *Miller* decision, appellant argues that (1) he is not the "rare juvenile offender" suitable for an LWOP sentence under *Miller*; and (2) the superior court employed an unconstitutional presumption in favor of LWOP when exercising its discretion under section 190.5, subdivision (b) at the resentencing.

II. *DISCUSSION*

The Eighth Amendment of the federal Constitution (applicable to the states through the Fourteenth Amendment) prohibits the infliction of "cruel and unusual punishment." (See *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 727.) This provision "guarantees individuals the right not to be subjected to excessive sanctions" (*Roper v. Simmons* (2005) 543 U.S. 551, 560 (*Roper*)) and "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned'" to both the offense and the offender (*ibid*). "The concept of proportionality is central to the Eighth Amendment." (*Graham, supra,* 560 U.S. at p. ___ [130 S.Ct. at p. 2021].)

Cases addressing the proportionality of sentences have fallen into two general classifications: challenges to the length of a term-of-years sentence as disproportionate in a particular case, and categorical challenges to the type of sentence imposed in certain types of cases, against a certain type of defendant. (*Graham*, *supra*, 560 U.S. at p. ___ [130 S.Ct. at pp. 2021-2022].) With respect to defendants who were juveniles at the time of the offense, the Supreme Court has found that the cruel and unusual punishment clause categorically bars the imposition of the death penalty (*Roper*, *supra*, 543 U.S. at pp. 572-573), as well as the imposition of an LWOP term in cases where the crimes are nonhomicide offenses (*Graham*, *supra*, 560 U.S. at p. ___ [130 S.Ct. at p. 2033]; see also *People v. Caballero* (2012) 55 Cal.4th 262 [sentence of 110 years to life for nonhomicide offenses was equivalent of LWOP and violated U.S. Const., 8th Amend.]).

In *Miller*, *supra*, 567 U.S. __ [132 S.Ct. 2455], the high court considered the sentences of two murder defendants who were 14 years old when they committed their crimes and who were sentenced to LWOP terms that were mandatory under state law. It held: "The Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. [Citation.] By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." (*Miller,* at p. 2469.) The court discussed in great detail the reasons that juveniles are "constitutionally different" than adults for sentencing purposes, including their lack of maturity and undeveloped sense of responsibility; their vulnerability to outside pressure and negative influences; their limited control over their own environment and their inability to extricate themselves from crime-producing settings; and their greater ability to change due to their possession of a character that is not as "well formed" as an adult's. (*Id.* at p. 2464.)

Appellant was 17 years old when he committed the crimes in this case. His sentence for special circumstance murder was governed by section 190.5, subdivision (b), which provides: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances . . . has been found to be true . . . 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." Section 190.5 allows the court to impose LWOP or 25 years to life in cases where the defendant was 16 or 17 years old at the time of the offense; for defendants who were 15 years of age or younger, LWOP may not be imposed at all. (*People v. Demirdjian* (2006) 144 Cal.App.4th 10, 17.)

Section 190.5, subdivision (b) differs from the mandatory schemes found unconstitutional in *Miller*, because it gives the court the discretion to impose a term that affords the possibility of parole in lieu of an LWOP sentence. But, as appellant notes, the statute has been judicially construed to establish a presumption that LWOP is the appropriate term for a 16- or 17-year-old defendant. In *People v. Guinn* (1994) 28 Cal.App.4th 1130, the court interpreted section 190.5, subdivision (b) to mean that "16- or 17-year-olds who commit special circumstance murder *must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life" (*Guinn,* at p. 1141), and further describes the statute as making LWOP the "generally mandatory" punishment for a youthful special circumstance murderer (*id.* at p. 1142). Other decisions (including one by this district), have characterized LWOP as the "presumptive" sentence under section 190.5, subdivision (b). (See *People v. Murray* (2012) 203 Cal.App.4th 277, 282; *People v. Blackwell* (2011) 202 Cal.App.4th 144, 159 (*Blackwell*); *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089.)

The presumption in favor of LWOP was applied by the sentencing court in this case. The court prefaced the imposition of sentence by stating, "One of the central issues today is whether or not the court will exercise discretion pursuant to Penal Code section 190.5 and deviate from the statutory requirement of life without the possibility of parole." It concluded by explaining, "Although Mr. Moffett was slightly under eighteen years old at the time, his actions that day, coupled with his criminal history, do not support, in my opinion, this Court exercising discretion and sentencing him to a . . . term of twenty-five years to life."

A presumption in favor of LWOP, such as that 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.' " (*Miller*, *supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2469].) Though *Miller* did 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." (*Ibid.*) 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.

We conclude remand is necessary so the court can consider the appropriate sentence on the murder count without reference to a presumption in favor of LWOP. While we do not fault the sentencing court for applying a presumption that reflected the law as it stood at the time of the sentencing hearing, the court did not exercise its discretion under section 190.5, subdivision (b) with the benefit of the *Miller* opinion.

Other comments by the court at the resentencing hearing convince us that remand is appropriate.

In response to defense counsel's observation that appellant had been convicted under the felony murder rule, the court stated, "We are not here today to debate the legality of the felony murder rule, nor can we engage in a philosophical discussion about its merits. It is the current state of the law in California." Though the court was correct that appellant was properly convicted of first degree felony murder under the law of this state, *Miller* makes clear that when a court is contemplating an LWOP sentence for a juvenile defendant, it should consider whether the defendant was the actual killer or intended to kill, noting that a juvenile who " 'did not kill or intend to kill has a twice diminished moral culpability.' " (*Miller*, *supra*. 567 U.S. at p. __ [132 S.Ct. at p. 2468], quoting *Graham*, *supra*, 560 U.S. at p. ___ [130 S.Ct. at p. 2027].) On remand, we are

confident the court will give appropriate weight to the fact that appellant was a non-killer convicted under the felony-murder rule.

We also note that the trial court placed great reliance on the trauma caused to the robbery victims in this case when determining the appropriate sentence for the murder count. Though appellant's conduct during the robbery bears on whether he was an active participant in and instigator of the criminal conduct that led to the shooting (which in turn bears on whether he was influenced by others), the psychological reactions of the robbery victims do not say much about appellant's maturity, prospects for reform, or mental state with respect to the homicide itself—the factors paramount under *Miller*. (*Miller*, *supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2468].)

Finally, when considering appellant's previous criminal history, the trial court mistakenly characterized a juvenile adjudication for assault as a felony, when it was designated a misdemeanor. On remand, the court can consider appellant's record without this misapprehension.

Appellant argues that instead of a remand for resentencing, we should direct the court to impose a sentence of 25 years to life, because his is not that rare case suitable for an LWOP sentence. He emphasizes that he was convicted of murder under the felony-murder rule, and did not kill or intend to kill Officer Lasater. We disagree.

The *Miller* court disapproved of mandatory LWOP sentences for juvenile defendants convicted of homicide offenses, but it declined to consider the defendants' alternative argument that the Eighth Amendment categorically bars LWOP sentences for juveniles, even for those who were 14 years of age or younger at the time of their offenses. (*Miller*, *supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2469].) "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." (132 S.Ct. at p. 2471.)

Appellant is correct that the evidence at trial was insufficient to establish that he intended to kill Officer Lasater.[2] But, by finding the felony-murder special circumstances to be true, the jury necessarily determined that appellant was at least a major participant in the underlying robbery who acted with reckless indifference to human life. (§ 190.2, subd. (d); *People v. Estrada* (1995) 11 Cal.4th 568, 575; see also *Tison v. Arizona* (1987) 481 U.S. 137.) "Such conduct, even when committed by a person who is 16 or 17 years of age, is highly culpable and may justify an LWOP sentence." (*Blackwell*, *supra*, 202 Cal.App.4th at p. 157.) Though two of the justices in *Miller* signed a concurring opinion indicating that an LWOP sentence would be unconstitutional if applied to a juvenile defendant who was not the actual killer and did not intend to kill, the majority did not adopt such a bright-line rule. (See *Miller*, *supra*, 567 U.S. at pp. ___ [132 S.Ct. at pp. 2475-2477 [conc. opn. of Breyer, J.].) Instead, it concluded that a sentencing court must consider this "twice diminished moral culpability" when making its sentencing decision. (*Id.* at p. 2468-2469.) We expect the court in this case will do so on remand, though we express no opinion as to what the ultimate sentence should be when this factor is taken into account.[3]

As the People concede, the court imposed a four-year consecutive sentence as the purported middle term for the robbery charged in count 2, whereas the actual middle term for second degree robbery is three years. (§ 213, subd. (a)(2) ["Robbery of the second degree is punishable by imprisonment in the state prison for two, three, or five years."].) The court also imposed four-year concurrent terms for the robberies in counts 3 and 4. On remand, any middle-term sentence imposed for robbery must be three rather than four years.

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[2] As previously noted, the Attorney General conceded as much and agreed that the killing of a peace officer special circumstance under section 190.2, subdivision (a)(7) had to be reversed based on the lack of intent to kill. (§ 190.2, subds. (c) & (d).)

[3] For the reasons stated in our previous opinion (No. A122763), we deny appellant's request that the case be remanded to a different judge for resentencing.

III. *DISPOSITION*

The sentence is vacated and the case is remanded for resentencing consistent with the views expressed in *Miller* and in this opinion. Although the focus of this appeal has been the sentence on the murder conviction, the court on remand may reconsider the entire sentence so long as it does not impose a total term in excess of the original sentence. (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1235; *People v. Burns* (1984) 158 Cal.App.3d 1178, 1184.) Should the court again elect to impose the middle term on any of the robbery counts, that term must be three years as provided by statute.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.

(A133032)

People v. Moffett

A133032

Trial court:	Contra Costa County Superior Court
Trial judge:	Hon. Laurel S. Brady

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, René A. Chacón, Supervising Deputy Attorney General and David M. Baskind, Deputy Attorney General, for Plaintiff and Respondent.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Moffett** First Appellate District No.: **A133032**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 20, 2012, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 20, 2012, at San Francisco, California.

E. Rios
Declarant

E. Rios
Signature

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