S206365

IN THE SUPREME COURT

THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent

vs.

LUIS ANGEL GUTIERREZ

Defendant and Appellant

APPEAL FROM THE JUDGMENT OF THE
CALIFORNIA SUPERIOR COURT, VENTURA COUNTY
COURT OF APPEAL NO. B227606
SUPERIOR COURT NO. 2008011529

The Honorable Patricia M. Murphy, Judge Presiding

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s):**

Federal Cases (cont.) **Page(s):**

State Cases

State Cases (cont.) **Page(s):**

Rules and Statutes **Page(s):**

Constitutions

Constitutions (cont.) **Page(s)**

United States Constitution

Other Authorities

ISSUE PRESENTED FOR REVIEW

Does the sentence of life without parole ("LWOP") imposed on this juvenile offender under Penal Code[1] section 190.5, subdivision (b), violate the Eighth Amendment under *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455]?

Encompassed within the above issue are the following questions:

1. Does Penal Code section 190.5 create a presumptive life without parole sentence, and if so, does this presumption violate the Eighth Amendment?

2. Does Penal Code section 190.5 require the trial court to consider factors deemed necessary by the *Miller* court prior to the imposition of a life without parole sentence?

4. Is the life without parole term imposed in this case cruel and unusual punishment under the Eighth Amendment and the California Constitution?

5. Does the Eighth Amendment require a categorical ban on life without parole sentences for juveniles?

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

INTRODUCTION

This case involves a life without parole sentence imposed on a juvenile offender under Penal Code section 190.5, subdivision (b).[2] This statute has been interpreted to require life without parole 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. Ybarra* (2008) 166 Cal. App. 4th 1069, 1089.) Here, the court imposed the life without parole sentence after appellant Luis Angel Gutierrez[3] 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. He was tried under the two theories of the felony murder rule and premeditation. Luis was 17 years old at the time of the charged offense and had no prior criminal record.

After the sentence was imposed, the United States Supreme Court issued its decision in *Miller v. Alabama* (2012) 567 U.S. ___, 183 L. Ed. 2d 407, and concluded that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. (*Id.* at 424.) In doing so, the Court established

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[2]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."

[3]Due to multiple individuals with the same surname in this case, first names are used in this brief for clarity. No disrespect is intended.

requirements that a sentencing court take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Ibid.*) 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 differences 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, 418, 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* decision was issued, Luis filed supplemental briefing in the Court of Appeal and argued *inter alia* that in light of the California case law holding that life without parole 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 his argument. On January 3, 2013, this Court

granted review of this case stating, "The petition for review is granted. The issue to be briefed and argued is limited to the following: Does the sentence of life without parole imposed on this juvenile offender under Penal Code section 190.5, subdivision (b), violate the Eighth Amendment under *Miller v. Alabama, supra,* 567 U.S. __ (132 S.Ct. 2455)?" On the same day, this Court also granted review in *People v. Moffett* (2012) 209 Cal. App. 4th 1465, review gr., January 3, 2013 (S206771), in which the California Court of Appeal, First Appellate District, Division Five, held that due to the established case law holding that life without parole is the presumptive sentence under section 190.5 and its effect on the sentencing court, remand is necessary for resentencing in light of *Miller*. On March 20, 2013, this Court also granted review, with briefing deferred, in *People v. Siackasorn* (2012) 211 Cal.App.4th 909, review gr., March 20, 2013, (S207973), in which the Court of Appeal, Third Appellate District had also held that remand for resentencing of a juvenile under section 190.5 was necessary in light of *Miller*.[4]

SUMMARY OF ISSUES AND FACTS

Luis was born and raised in Mexico and had a ninth grade education. (See Probation Officer's Report (POR) at p. 4.) His father, Jose Luis Gutierrez, lived with his brother Abel Gutierrez and his wife, Josephina, who paid a "coyote" for Luis' passage to come to the United States and live

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[4]A number of unpublished cases are also pending review in this Court, including *People v. Meraz* (January 22, 2013, B235143) Unpub. (review filed March 1, 2013, S208967), in which the Second Appellate District, Division Six remanded a Penal Code section 190.5 life without parole case to the superior court for resentencing under *Miller*.

with them in their Simi Valley home. (*Ibid.*, 2 RT 192.)[5] Also residing in the home were the three sons of Abel and Josephina, a friend of the family, and Josephina's brother and sister. (*Ibid.*)

Although Luis moved to the United States at the age of 15, he did not attend high school. (*Id.* at p. 2.) He worked as a cook in a restaurant for approximately one year until he was fired approximately 20 days prior to the offense in this case. (*Ibid.*) Luis had no prior criminal record. (POR at pp. 2, 18.) However, he was not happy living in the United States and wanted to return to Mexico. (*Id.* at p. 12; 3 RT 246.)

The night of the offense appellant had become intoxicated at a family party and after leaving the party shortly before going home and had also used methamphetamine. (POR at p.11.) Evidence showed that some time after leaving the party, Luis returned to the home in Simi Valley and killed Josephina in her bedroom. Her body was found on the floor of the bedroom by Jose Mendoza, her brother. (2 RT 230.) There were 28 stab wounds in Josephina's body in the back, side, stomach, face, neck and fingers. (3 RT 458-474.) The wounds in her fingers were consistent with defensive wounds. (3 RT 475.) There were also fresh bruises on the face and body. (3 RT 477-481.) The cause of death was loss of blood due to multiple stab wounds. (3 RT 481-482.) Numerous cuts on Josephina's nightgown corresponded to cuts on her body, although not all the wounds on the body corresponded to cuts in the nightgown. (3 RT 486-487, 490-491.) Some of the wounds may have occurred after death. (3 RT 501-502.) However, based on the appearance of the wounds, the doctor who

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[5]At trial, Luis's father denied that Abel and Josephina had provided financial assistance to bring Luis to the United States. (1 RT 172-173.)

performed the autopsy believed Josephina was alive when she sustained them. There was no evidence of injury or trauma to the vaginal area. (3 RT 481.)

The morning Josephina's body was found, Luis was observed to have sustained a severe wound to his hand for which he for which he went to the hospital for treatment. (1 RT 157-159, 177-179.) DNA evidence connected Luis to the crime scene and to Josephina. (2 RT 339-357.) A blood pattern analyst who viewed photographs of Josephina's body saw a bloodstain on the back that might have been an imprint or a swipe, and it was possible that the shape was consistent with an erect male penis. (3 RT 576-578.) Although a sperm fraction found on Josephina's body included a match to her husband, Abel Gutierrez, all the others, including Luis, were excluded. (2 RT 361-363.)

In an interview with police, Luis first denied any involvement in Josephina's death, and eventually acknowledged a confrontation with her involving the knife, but did not take responsibility for initiating the confrontation. (2 CT 385-385, 3 CT 609-611.) Luis stated that Josephina had stabbed him and stabbed herself, and that she took off her own nightshirt and his pants because she wanted him to have sex with her. (3 CT 609-611, 618-619, 650-651, 661, 667, 668, 670, 674.) Luis told officers that after Josephina stabbed him, he stabbed her in the back about three times. (3 CT 635, 638, 666.)

Abel told the probation department that prior to the offense, he had had a good relationship with Luis and was not aware of any motive for his conduct. (POR at pp. 13-14.) Luis was born on February 2, 1991, which made him 17 years old at the time of the offense. (4 RT 673.)

ARGUMENT

I. THE LIFE WITHOUT PAROLE SENTENCE IMPOSED ON A JUVENILE OFFENDER AS THE PRESUMPTIVE SENTENCE AND WITHOUT CONSIDERATION OF FACTORS DETERMINED TO BE NECESSARY UNDER *MILLER V. ALABAMA* VIOLATES THE EIGHTH AMENDMENT

A. A Presumptive Life Without Parole 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*, which held that capital punishment of juveniles violates the Eighth Amendment's ban on cruel and unusual punishment, and in *Graham*, which held unconstitutional a sentence of life in prison without parole for a juvenile in a nonhomicide case. (*Roper v. Simmons, supra,* 543 U.S. 551 (2005); *Graham v. Florida* (2010) 560 U.S. ___, 130 S.Ct. 2011.)

In *Miller v. Alabama, supra,* 567 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 under their state statutes 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, supra,* 560 U.S.___, 130 S. Ct. 2011, 2027, 2032.) As *Miller* explained:

> Life-without-parole terms, the [*Graham*] Court wrote, "share some characteristics with death sentences that are shared by no other sentences." [*Graham v. Florida, supra,*] 560 U.S., at ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825. Imprisoning an offender until he dies alters the remainder of his life "by a forfeiture that is irrevocable." *Ibid.* (citing *Solem v. Helm*, 463 U.S. 277, 300-301, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)). And 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 than an adult offender." *Graham,* 560 U.S., at ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825. The penalty when imposed on a teenager, as compared with an older person, is therefore "the same . . . in name only." *Id.*, at ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825. All of that suggested a distinctive set of legal rules: In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment.

(*Miller, supra*, 567 U.S. ___, 183 L. Ed. 2d 407, 418, 421.) The *Miller* Court recognized that life without parole sentences "share characteristics with death sentences that are shared by no other sentences." (*Ibid.*) The Court emphasized 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.*)

The *Miller* court did not merely conclude that mandatory life without parole sentences violate the Eighth Amendment, but also mandated that a

sentencing court "follow a certain process -- considering an offender's youth and attendant characteristics" before imposing the sentence. (*Miller v. Alabama, supra,* 567 U.S. ___, 183 L. Ed. 2d 407, 426.) To this end, the court established prerequisites that a sentencing court take into account: "[1] how children are different, and [2] how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id.* at 567 U.S. ___, 183 L. Ed. 2d 407, 424.) These requirements are grounded in 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*, 567 U.S. ___, 183 L. Ed. 2d 407, 418, citing *Roper v. Simmons, supra,* 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.*)

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.

At the time of Luis' sentencing, well-established case law interpreted section 190-5 as requiring life without parole as the "presumptive punishment." (*People v. Guinn, supra,* 28 Cal. App. 4th 1130, 1141-1142 (*Guinn*"); see also *People v. Ybarra, supra,* 166 Cal. App. 4th 1069, 1089.) The defendant in *Guinn* had challenged his life without parole sentence arguing that due to inadequate guidelines, the sentence would be imposed arbitrarily and capriciously in violation of the Eighth Amendment. (*Guinn, supra*, at 1141, citing *Furman v. Georgia* (1972) 408 U.S. 238, 238-240.) Rejecting this argument, the *Guinn* court determined that because life without parole was the presumptive sentence under section 190.5, "the court's discretion is comcomitantly circumscribed to that extent." (*Guinn, supra*, at 1142.)

The defendant in *Guinn* also argued that section 190.5 was impermissibly ambiguous because it did not provide any specific procedure for determining the penalty, contrasting it with the only other two statutes that provide for choices between nondeterminate terms provide for a penalty phase jury trial. (*Guinn, supra*, 28 Cal. App. 4th 1130, 1144-1145; citing section 190.3 [pertaining to choice between death or LWOP in a capitol murder case] and section 190.05 [pertaining to choice between LWOP or 15 years to life in case of a second degree murder with a prior prison term for murder].) The *Guinn* court distinguished these statutes from section 190.5, stating that sections 190.3 and 190.05 prescribe procedures

for submitting the selection of sentence between the two *equal* choices to a trier of fact, and in contrast, section 190.5 "provides a presumptive penalty" and "does not involve two equal penalty choices, neither of which is preferred." (*Id.* at 1145.) *Guinn* concluded that the section 190.5 enactment evidences a "preference for the LWOP penalty," and declined to extend the procedural protections of sections 190.3 and 190.05 to juvenile offenders facing life without parole sentences under section 190.5. (*Ibid.*)

Section 190.5, as interpreted by *Guinn* and other courts, contains a presumption that life without parole should be imposed. This is contrary to *Miller* which implicitly held a presumption against imposition of life without parole should apply, when it stated that such a sentence imposed on youth should be uncommon and rare, and mandates that a sentencer "follow a certain process . . . *before* imposing a particular penalty, and requires the sentencer to "examine *all* these circumstances *before* concluding that life without any possibility of parole [is] the appropriate penalty." (*Miller v. Alabama, supra*, 567 U.S. ___, 183 L. Ed. 2d 407, 424, 426 (emphasis added).)[6]

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[6]In footnote 10, the *Miller* court references 15 jurisdictions that make life without parole discretionary for juveniles, including California. (*Miller v. Alabama, supra*, 567 U.S. ___, 183 L. Ed. 2d 407, 427, fn. 10, citing, *inter alia*, section 190.5.) However, the footnote does not address California's case authority, exemplified in *Guinn* and *Ybarra*, that has improperly circumscribed the necessary discretion by placing on sentencing courts the requirement that life without parole sentences be presumed. The Supreme Court did not address this inverted presumption in *Miller*, and therefore, any inference that can be drawn from footnote 10 does not dispose of the issue here, as cases are not authority for propositions not considered. (*People v. Avila* (2006) 38 Cal.4th 491, 566; see also *Texas v. Cobb* (2001) 532 U.S. 162, 169 [121 S.Ct. 1335, 149 L.Ed.2d 321] ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue."].)

Furthermore, on January 7, 2013, the United States Supreme Court granted certioriari, vacated, and remanded another case, formerly cited as *People v. Blackwell*

In the instant case, the Court of Appeal did not acknowledge the established presumption of LWOP sentencing under section 190.5. Instead, the court stated 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.[7] (Opn. at p. 15.) However, under principles of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455, it must be

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(2011) 202 Cal.App.4th 144 [134 Cal. Rptr. 3d 608], judg. vacated and cause remanded sub nom. *Blackwell v. California* (2013) 568 U.S. ___ [184 L. Ed. 2d 646, 133 S. Ct. 837], which had affirmed an LWOP sentence in the context of a felony murder for a 17 year old under section 190.5, subdivision (b) and established a "presumptive penalty of LWOP" when there is a special circumstance murder). (See *People v. Perez* (2013) 214 Cal. App. 4th 49, 56, fn. 5.) The order granting certiorari stated: "Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari granted. Judgment vacated, and case remanded to the Court of Appeal of California, First Appellate District, for further consideration in light of *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)." (*Blackwell v. California* (January 7, 2013.) 33 S. Ct. 837; 184 L. Ed. 2d 646; 2013 U.S. LEXIS 401; 81 U.S.L.W. 3364.)

[7]Presumably operating from the "presumptive" LWOP stance articulated in *Guinn* and *Ibarra*, the sentencing 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 included within the scope of section 190.3. (3 RT 874.) Most significantly, the record fails to show any social study or 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 his traits are "less fixed," and his actions less likely to be evidence of irretrievable depravity. (*Miller v. Alabama, supra*, 567 U.S. ___, 183 L. Ed. 2d 407, 1418.)

presumed that the sentencing court was acting in accordance with the established case law that life without parole was the presumptive sentence. (See *People v. Guinn, supra,* 28 Cal. App. 4th 1130, 1141-1142; *People v. Ybarra, supra,* 166 Cal. App. 4th 1069, 1089; *People v. Murray* (2012) 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 life without parole sentence. At the time of sentencing, the trial court did not have the mandate of the *Miller* Court requiring the sentencing court to examine specific factors before concluding that life without parole is the appropriate penalty. Regardless of whether the judge explicitly referred to the standard under section 190.5, subdivision (b), the sentencing court is presumed to have followed *Guinn* and to have treated life without parole 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"].) By establishing life without parole 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.

B. Even Without the Presumption for LWOP Sentencing, Section 190.5 is Constitutionally Insufficient because it Fails to Require the Trial Court to Consider Factors Established as Necessary under *Miller*

As previously discussed, in *Miller v. Alabama, supra*, 567 U.S. ___, 183 L. Ed. 2d 407, 426, the High Court mandated that a sentencing court "follow a certain process -- considering an offender's youth and attendant

characteristics" before imposing a life without parole sentence. To this end, the court established prerequisites that a sentencing court take into account: "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" (*id.* at 424) and outlined the following factors: First, juveniles have a "lack of maturity and an underdeveloped sense of responsibility" leading to "recklessness, impulsivity, and heedless risk-taking." (*Id. at* 418, citing *Roper v. Simmons, supra,* 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.*) The Court further 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).)

Section 190.5 does not require consideration of the above factors, in contravention of *Miller*. Section 190.5, subdivision (b) simply provides in relevant part that the sentence for an offender under its provisions "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." Under section 190.5, a sentencer could impose an LWOP sentence without consideration of all of the factors required in *Miller*. Although the statute does not specify any sentencing criteria, the *Guinn* court stated that "common sense" would indicate that "the factors listed in section 190.3 and mitigating circumstances listed in rule [4].423 are the normal and logical criteria for making any reasoned exercise of discretion whether a particular defendant is deserving of some leniency in sentencing." (*People v. Guinn, supra,* 28

Cal. App. 4th 1130, 1144, see accord., *People v. Ybarra, supra,* 166 Cal. App. 4th 1069, 1089-1094.)

However, neither section 190.3, nor rule 4.423 require that the sentencing court address the specific factors articulated in *Miller*. As a preface to rule 4.423, rule 4.420 (b) states that in exercising discretion, the sentencer "may" consider circumstances in mitigation, but does not, on its face, require it. In the instant case, the probation report did not address any of the factors in rule 4.423, stating "[a]s the defendant is subject to the imposition of an indeterminate prison sentence, Judicial Council Rules 4.421 and 4.423 will not be addressed." (See Report of Probation Officer (RPO) at p. 18.) The court relied on the probation report in sentencing appellant and did not refer to any factors in rule 4.423. (4 RT 862, 873-874.) Furthermore, even if the court had considered the factors in rule 4.423, none of them require application of the specific *Miller* factors. Similarly, section 190.3 does not specifically require the court to address the considerations mandated in *Miller*. Section 190.5, subdivision (I) does authorize the court to consider "[T]he age of the defendant at the time of the offense." However, under *Miller*, it is not enough that chronological age itself be considered as "relevant mitigating factor of great weight," but "the background and mental and emotional development of a youthful offender" must also be duly considered." (*Miller v. Alabama, supra*, 576 U.S. ___, 183 L. Ed. 2d 407, 422.) Section 190.3 is insufficient because it does not mandate that the court address the defendant's age as a primary consideration, or address specifically how juveniles are different and how those differences counsel against irrevocably sentencing appellant to a lifetime in prison. (*Id.* at 424.) Nor does it require the sentencing court address as mitigating factors the "lack of maturity and an underdeveloped

sense of responsibility," are more vulnerable to "negative influences and outside pressures and have limited control over their own environment," are subject to "recklessness, impulsivity, and heedless risk-taking," and evidence that a juvenile's character is not as "well formed" as an adult's, or that his traits are "less fixed." (*Id.* at 418.) In *Miller*, the High Court found statutes of two state unconstitutional because they precluded sentencing courts from considering the necessary factors before imposing a life without parole sentence. Our statute is unconstitutional because it does not require the sentencing courts to consider the necessary factors before imposing a life without parole sentence.

C. Appellant is Entitled to a New Sentencing Proceeding

In the Opinion, the Court of Appeal decided that remanding the case for resentencing in light of *Miller* would be a futile exercise because the trial court was aware of its discretion and declined to impose a more lenient sentence, implying that a harmless error approach would be appropriate in this case. (Opn. at p. 15.) However, in concluding that remand would be "futile" the Court of Appeal showed no awareness of the *Guinn* holding that characterized life without parole as the "presumptive punishment" that is "generally mandatory" and that the sentencer's discretion is "concomitantly circumscribed to that extent." (*People v. Guinn, supra*, 28 Cal. App. 4th 1130, 1142.) Instead, the court merely characterized the *Guinn* decision as saying that a juvenile defendant sentenced under section 190.5, subdivision (b) "*may be* sentenced to life without possibility of parole." (Opn. at p. 14, emphasis supplied by the court.) Thus, the Court of Appeal's conclusion that resentencing in light of *Miller* would be a "futile exercise" is not based

on a valid foundation. Because the sentencing court presumably employed the incorrect *Guinn* presumption in favor of a life without parole sentence, reversal and remand is required. An erroneous understanding by the trial court of its discretionary power "is not a true exercise of discretion." (*People v. Aubrey* (1998) 65 Cal. App. 4th 279, 282; *People v. Marquez* (1983) 143 Cal. App. 3d 797, 803.) A trial court cannot exercise "informed discretion" when it is unaware of the scope of its powers. (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247-1248.)

Furthermore, the Supreme Court's opinion in *Miller* represents a major development in Eighth Amendment jurisprudence. The trial court did not have the benefit of *Miller* when sentencing appellant. As a rule, a sentencing court is presumed to have considered all relevant criteria in imposing judgment. (*People v. Superior Court (Du)* (1992) 5 Cal. App. 4th 822, 836.) However, *Miller* changed the law on what factors are applicable in sentencing by elaborating extensively on the specific ways in which a defendant's age is relevant, and by stating that life without parole in juvenile cases involving homicide will be "uncommon" and "rare." (*Miller v. Alabama, supra*, 576 U.S. ___, 183 L. Ed. 2d 407, 418-424.) Luis was sentenced on August 23, 2010. As *Miller* was decided after Luis was sentenced, it would make no sense to presume the sentencing court was aware of its requirements. Remand is necessary to ensure that the constitutionally factors are considered.

On remand, the sentencing court will be presented with a set of considerations it did not confront before. Previously, consideration of the factors required in *Miller* only applied in nonhomicide cases. (*Graham v. Florida, supra*, 560 U.S. at ____ 130 S. Ct. 2011, 176 L. Ed. 2d 825.) It was not until *Miller* was decided on June 25, 2012, that these factors and

considerations were applied in the context of homicide cases. (*Miller v. Alabama, supra*, 576 U.S. ___, 183 L. Ed. 2d 407, 418-419.) Previously, it had been held that there was a "statutory preference" for life without parole under section 190.5. (*People v. Ybarra* (2008) 166 Cal. App. 4th 1069, 1089.) *Miller* now casts section 190.5 in a dramatically different light. The prosecution has a different task now, and the defense will have new tools at its disposal. The record does not indicate the court was in any way mindful of *Graham* in sentencing appellant, or that evidence or argument was presented in prescience of *Miller*. Remand is therefore required.

II. THE LIFE WITHOUT PAROLE TERM IMPOSED IN THIS CASE IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT AND THE CALIFORNIA CONSTITUTION

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment has been incorporated to the states through the Fourteenth Amendment. (*Roper, supra,* 543 U.S. at 561 (citations omitted); U.S. Const. amend. XIV.) Embedded within the Eighth Amendment is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." (*Weems v. United States* (2010) 217 U.S. 349, 367.) What is permissive under the Eighth Amendment varies depending on the age of the defendant. (See, e.g., *Roper, supra,* 543 U.S. at 553-54 [considering the characteristics of juveniles in holding that imposing the death penalty on juveniles is unconstitutional]; *Thompson v. Oklahoma* (1988) 487 U.S. 815 [considering juveniles' characteristics in holding that imposing the death penalty on children 16 and younger is unconstitutional].) To determine

what is "cruel and unusual," courts must look to "the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101. The standard of "cruel and unusual" is necessarily an evolving standard because it embodies a moral judgment. (*Graham, supra*, 130 S.Ct. at 2011; *Kennedy v. Louisiana* (2008) 554 U.S. 407, 419. The standard itself remains the same, but its applicability must reflect the changes in moral understanding of society. (*Graham, supra*, 130 S.Ct. at 2011; *Kennedy, supra*, 28 S.Ct. at 2649.)

Article 1, section 17 of the California Constitution provides: "Cruel *or* unusual punishment may not be inflicted or excessive fines imposed." (Emphasis added.) The California proscription has independent force. In applying the California constitutional provision, state courts are informed by, but not limited to, federal constructions of the Eighth Amendment. (E.g., *People v. Dillon* (1983) 34 Cal. 3d 441, 481-482.)

Both federal and California proportionality standards prohibit punishment that is grossly disproportionate to culpability of the offender. *Miller* explained that the Eighth Amendment's guarantee that individuals will not be subjected to excessive sanctions, "'flows from the basic "precept of justice that punishment for crime should be graduated and proportioned"' to both the offender and the offense." (*Miller, supra,* at p. 2463.) As juveniles categorically "have diminished culpability and greater prospects for reform, 'they are less deserving of the most severe punishments.'" (*Miller*, at p. 2464.) Thus, a formal and separate proportionality analysis for juveniles must be incorporated into Eighth Amendment jurisprudence. The Supreme Court has consistently held that juveniles are different from adults in constitutionally relevant ways. (*See, e.g., Miller v. Alabama, supra,* 132 S.Ct. 2455; *J.D.B. v. North Carolina* (2011) ___ U.S.___, 131

S.Ct. 2394; *Graham v. Florida, supra,* 130 S.Ct. 2011; *Roper v. Simmons, supra,* 543 U.S. 551; *Haley v. Ohio* (1948) 332 U.S. 596.) The Court has also recognized that a juvenile's age is far "more than a chronological fact." (*Miller, supra,* at p. 2467; *J.D.B.*, at p. 2403.)

In *In re Lynch* (1972) 8 Cal. 3d 410, 425-427, and its progeny, this Court defined three inquiries which may render a punishment "cruel or unusual" under the state constitution. Thus, a defendant "attacking his sentence as cruel or unusual must demonstrate his punishment is disproportionate in light of (1) the nature of the offense and defendant's background, (2) the punishment for more serious offenses, or (3) punishment for similar offenses in other jurisdictions. [Citation.] The petitioner need not establish all three factors—one may be sufficient [citation], but the petitioner nevertheless must overcome a "considerable burden" to show the sentence is disproportionate to his level of culpability [citation]." (*In re Nunez* (2009) 173 Cal.App.4th 709, 725.)

In *People v. Dillon, supra*, 34 Cal. 3d 441, 481-482, this Court specifically addressed the case of a 17-year old who organized a group of companions to enter the property of nearby neighbors who were growing marijuana, in order to steal from them. (*Id.* at 451.) Aware that at least one of the neighbors carried a gun, the defendant suggested, "just hold him up. Hit him over the head or something. Tie him to a tree." (*Ibid.*) Several of the boys brought shotguns and the defendant carried a .22 caliber semiautomatic rifle. (*Ibid.*) The boys also equipped themselves with a baseball bat, sticks, a knife, wire cutters, tools for harvesting the marijuana, paper bags to be used as masks or for carrying plants, and rope for bundling plants or for restraining the guards if necessary. (*Ibid.*) While on the property, the defendant saw the neighbor carrying a shotgun and walking up

a trial. (*Id.* at 452.) The defendant began firing his rifle rapidly at the neighbor who suffered nine bullet wounds and died a few days later. (*Ibid.*) The defendant was convicted of first degree felony murder, which subjected him to a life sentence. (*Id.* at 450, 477.)

As heinous as Dillon's offense was, this Court held that a 25 year to life sentence was disproportionate to the youth's culpability, and therefore constituted cruel and unusual punishment. (*People v. Dillon, supra*, 34 Cal. 3d 441, 487.) In reducing the sentence, this Court noted, "At the time of the events herein defendant was an unusually immature youth. He had no prior trouble with the law, and [...] was not the prototype of a hardened criminal who poses a grave threat to society." (*Ibid.*) Almost 30 years prior to *Roper, Graham and Miller*, *Dillon* was prescient in recognizing that the immaturity and recklessness of a juvenile offender significantly reduced his culpability, placing the extreme life sentence into the category of cruel and unusual punishment. (*Id.* at pp. 487-488, 482-483.) The United States Supreme Court's decisions in *Roper, Graham* and *Miller,* and its recognition of developmental and psychological factors affecting the culpability of youthful offenders, reinforces the approach taken in *Dillon* in determining the disproportionality of life without parole sentences in even the gravest offenses.

We recognize the extreme gravity of the offense in this case. The evidence shows that Luis inexplicably killed his aunt in her own bedroom in an extremely violent manner that the trial court characterized as "horrific." (4 RT 873.) Josephina was not only his relative, but his benefactor who, along with her husband, provided Luis with a place to live, and reportedly assisted him in coming to this country from Mexico. (2 RT 190-192, POR at p. 4.) The seemingly inexplicable nature of this offense, while pointing

to its gravity, also points to the irrational and impulsive mind set of this juvenile offender, and the impact of alcohol and methamphetamine in creating aggressive behavior. Like the defendant in *Dillon,* Luis had no prior criminal background and no reported history of violence. (POR at p. 18.) Like Dillon, Luis was immature, having completed only a ninth grade education in Mexico, and although having come to the United States at the age of 15, he did not attend high school. (*Id.* at p. 2.) Abel, Luis's uncle and Josephina's husband, did not see anything like this coming. Prior to the offense, Able had a good relationship with Luis, and although there had been some minor incidents where words had been exchanged, he said he had no problems with Luis. (*Id.* at p. 13.) Although they lived in the same house, Able never noticed any sexual attraction of Luis toward his wife, and he was disturbed by any apparent lack of motive. (*Id.* at p. 14.) According to the probation report, unidentified members of the victim's family expressed that Luis appeared to be an angry and aggressive person at times. (*Id.* at p. 17.) But no one attributed to him any acts of violence. (*Ibid.*) His behavior was consistent with heavy alcohol and methamphetamine use. Luis had used methamphetamine shortly before the offense and had been at a family party where he may have consumed as many as 14-20 beers. (*Id.* at pp. 3, 11.)

Approximately 20 days prior to the offense, Luis was fired from his job due to attendance problems. (POR at p. 2.) Luis had also recently begun smoking methamphetamine, which he admitted to using on March 15, 2008, the day before he was arrested. (*Id.* at. p. 3.) According to the National Institute on Drug Abuse, users of methamphetamine can display a number of psychotic features, including paranoia, visual and auditory

hallucinations, and delusions.[8] Symptoms of methamphetamine abuse include anxiety, confusion, insomnia, mood disturbances, and violent behavior. (*Ibid.*) State and federal courts have regarded methamphetamine use as a mitigating factor in determining culpability of the user. (See e.g., *Correll v. Ryan* (9th Cir. 2008) 539 F.3d 938, 954; *United States v. Nichols* (9th Cir. 2006) 464 F.3d 1117, 1121; *People v. Thompson* (2010) 49 Cal. 4th 79, 141, 142; *Hawes v. State Bar* (1990) 51 Cal. 3d 587, 592, 593.)

In *Roper v. Simmons, supra,* 543 U.S. 551, the United States Supreme Court addressed the constitutionality of the death penalty with regard to a juvenile offender. The defendant in *Simmons* was 17 years old when he planned and executed the murder of an innocent woman in her home. (*Id.* at 556.) Prior to the crime, Simmons told two friends he wanted to murder someone, and laid out a plan to commit a burglary by breaking and entering, tying up a victim, and throwing her off a bridge. (*Ibid.*) He assured his friends they could get away with it because they were minors. (*Ibid.*) They entered the bedroom of the victim, used duct tape to cover her eyes and mouth and bind her hands, covered her head with a towel, walked her to a railroad trestle overlooking a river, tied her hands and feet with electrical wire, wrapped her whole face in duct tape, and threw her from the bridge, drowning her in the waters below. (*Id.* at 556-557.)

Although the issue in *Roper* was whether the Eighth Amendment prohibited the use of the death sentence as to juvenile offender and did not involve an individual evaluation of proportionality as a component of whether the sentence was cruel or unusual, the High Court determined that the Eighth Amendment guarantees individuals the right not to be subjected

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[8](See http://www.drugabuse.gov/publications/research-reports/methamphetamine-abuse-addiction/what-are-long-term-effects-methamphetamine-abuse.)

to excessive sanctions, and that the right flows from the basic "'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" (*Roper v. Simmons, supra,* 543 U.S. 551, 560; quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 311, *and Weems v. United States, supra,* 217 U.S. 349, 367.) Furthermore, by protecting "even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." (*Ibid.*) The Court concluded that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity" should require a less severe sentence. (*Id.* at 573.)

In *Roper, Graham* and *Miller*, the Supreme Court recognized that a youth "is not absolved of responsibility for his actions," but that his or her culpability is reduced, and therefore, an the harshest penalties are developmentally inappropriate. In the case at bar, the sudden and uncharacteristic act of extreme violence that resulted in Josephina's death is impossible to explain. Luis' immaturity, his impulsiveness and irrational conduct, his recent drug use, and sudden firing from his job of over one year, all point to severe undiagnosed and untreated difficulties. This, combined with the fact that Luis had no prior record of criminality, shows that, as in *Dillon*, Luis' sentence is grossly disproportionate to his individual culpability "as shown by factors such as his age, prior criminality, personal characteristics, and stated of mind." (*Dillon, supra*, at p. 479.) For all the above reasons, Luis' sentence is cruel and unusual under the proportionality standards of the Eighth Amendment and Article 1, section 17 of the California Constitution.

III. THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRES A CATEGORICAL BAR AGAINST LIFE WITHOUT PAROLE SENTENCES FOR JUVENILE OFFENDERS.

As previously discussed, the *Miller* Court did not reach the question as to whether there must be a categorical ban of life without parole 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.

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, supra,* 543 U.S. 551; *Graham v. Florida, supra,* ___ U.S. ___, 130 S.Ct. 2011.) Appellant's case logically is indistinguishable from *Roper* and *Graham*. His sentence of life in prison without parole should be vacated, based on the Eighth Amendment's prohibition against cruel and unusual punishments, and his case remanded for re-sentencing to life with the possibility of parole.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const. amend XIII.) The Eighth Amendment has been incorporated to the states through the Fourteenth Amendment. *Roper, supra,* 543 U.S. at 561 (citations omitted); U.S. Const. amend. XIV. Embedded within the Eighth Amendment is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." (*Weems v. United States, supra,* 217 U.S. 349, 367.) What is permissive under the Eighth Amendment varies depending on the age of the defendant. (See, e.g., *Roper, supra,* 543 U.S. at 553-54 [considering the characteristics of juveniles in holding that imposing the death penalty on juveniles is unconstitutional]; *Thompson v. Oklahoma, supra,* 487 U.S. 815 [considering juveniles' characteristics in holding that imposing the death penalty on children 16 and younger is unconstitutional].)

To determine what is "cruel and unusual," courts must look to "the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra,* 356 U.S. 86, 101. The standard of "cruel and unusual" is necessarily an evolving standard because it embodies a moral judgment. (*Graham, supra,* 130 S.Ct. at 2011; *Kennedy v. Louisiana* (2008) 128 S.Ct. 2641, 2649. The standard itself remains the same, but its

applicability must reflect the changes in moral understanding of society. (*Graham, supra*, 130 S.Ct. at 2011; *Kennedy, supra*, 28 S.Ct. at 2649.)

Following *Roper, Graham* held that a sentence of life without possibility of parole for a juvenile in a nonhomicide case violated the Eighth Amendment's prohibition against cruel and unusual punishment because it violates society's "evolving standards of decency." To determine the extent to which society's standards of decency have evolved, three factors are to be considered. First, courts consider "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against a particular type of sentencing. (*Graham, supra*, 130 S.Ct. at 2022 (quoting *Roper, supra*, 543 U.S. at 572). Next, courts look at the culpability of offenders in light of their crimes and the characteristics of the offenders-including scientific facts that bear on culpability-along with the severity of punishment. (*Graham, supra,* at 2026.) Finally, the last step is to assess the effectiveness of the sentence in achieving four penological goals-retribution, deterrence, incapacitation and rehabilitation. (*Id.* at 2027-30.)

The Supreme Court in *Graham* first considered "objective indicia of society's standards, as expressed in legislative enactments and state practice," to determine whether there is a national consensus against a particular type of sentencing. (*Graham, supra*, at 2022 (quoting *Roper, supra,* 543 U.S. at 572). Looking at sentencing practice, the Supreme Court held that, given the rarity of imposition of life without parole for nonhomicide offenses, there was a national consensus showing that standards of decency had evolved to prohibit life without parole for nonhomicide offenses. (*Graham, supra*, 130 S.Ct. at 2023-26.) The

Supreme Court then assessed the culpability of offenders – looking at the severity of their crimes and characteristics of the offender. (*Id.* at 2026.) Considering the characteristics of juveniles, the Supreme Court held that juveniles, as a class, were less culpable than other offenders. (*Id.* at 2027.) The Supreme Court, among other things, looked at the offense and determined nonhomicide offenses were less blameworthy than homicide. (*Ibid.*) Finally, the Supreme Court held that severity of punishment was extreme. (*Id.* at 2027-28.)

Graham is important for both reaffirming the considerations for determining whether a sentence violates the Eighth Amendment as well as illustrating the Supreme Court's heavy reliance on the unique characteristics of juveniles in determining what juvenile sentences are permissible. *Graham* also is important for what it does not say. *Graham* does not hold that a sentence of life without parole for a homicide is constitutional. The Supreme Court distinguished juvenile life without parole for homicide and nonhomicide cases in many parts of its analysis. The sentence at issue in *Graham*, however, was life without parole for the commission of a nonhomicide crime; therefore, the Supreme Court could not have held that life without parole was permissible for homicide because so holding would have been an advisory opinion in violation of the constitution.[9]

The Supreme Court in *Roper, supra*, 543 U.S. 55, when discussing

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[9]Chief Justice Roberts' lone concurring opinion in *Graham*, which is not binding precedent, sets forth Roberts' objection to any categorical ban on life without parole for both homicide and nonhomicide offenses-in contrast to the Supreme Court's majority opinion that imposed a categorical ban. (See *Graham,* 130 S.Ct. at 2041 (Roberts, C.J., concurring).) While *Graham* is useful in determining how a juvenile's unique characteristics interact with Eighth Amendment analysis, *Graham* does not dictate the outcome in this case.

the inapplicability of deterrence as a legitimate penological goal, said, "To the extent that the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." However, the Supreme Court was not holding that the deterrent effect of life without parole was sufficient justification for its imposition; instead, the Supreme Court merely was using life without parole as an example of alternative punishment. The offender in *Roper* was not challenging a sentence of life without parole; he simply was trying not to be put to death. The fact that the Supreme Court did not intend to hold life without parole constitutional in *Roper* is recognized by its holding in *Graham* that life without parole is unconstitutional for nonhomicide offenses. The principles expressed in *Roper* and *Graham* are helpful in this case; they do not foreclose the relief appellant seeks here.

Sentencing juvenile offenders to life without parole is cruel and unusual punishment because society's standards have evolved to prohibit it. While *Graham* and *Roper* examined legislation and statistics about the commonality of such sentences, these are incomplete indicators of the broader question of whether society's standards have evolved, but they are helpful. (*See Graham, supra*, 130 S .Ct. at 2022; *Roper, supra*, 543 U.S. at 572.) It was recently estimated that there are about 2,600 offenders currently serving life without parole for homicides committed while they were juveniles.[10] Seven states and the District of Columbia prohibit life without parole for juveniles, four states allow life without parole but do not

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[10]Human Rights Watch, State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP) (October 2, 2009), available at www.hrw.org/en/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-lifewithout-parole.htm.

impose it, and 40 states and the federal system actively sentence juveniles to life without parole.[11] Legislation does not seem to be indicative of a national consensus against life without parole for juveniles. The absence of legislation prohibiting a particular type of sentence, however, is not conclusive as to contemporary standards of decency. (See *Graham, supra*, 130 S.Ct. at 2022 [looking past legislation to actual sentencing practices]; see *also Roper, supra*, 543 U.S. at 572.)

Society recognizes that juveniles are different, even without the specific statistics about sentencing. California, for example, 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 §12814.6 (must be 16 to obtain a driving license); Bus. & Prof. Code § 25658, subdivision (b) (setting the minimum drinking age at 21); Family Code §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 §6100 (must be 18 to make a will); and Code of Civil Procedure §203 (must be 18 to serve on a jury); Penal 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.

Roper and *Graham* show that the Supreme Court's view and society's view of juvenile offenders are influenced highly by scientific facts-namely that, due to juveniles' innate biological differences, they must not be held to the same punitive standard as adults. (See also *Thompson, supra*, 487 U.S. at 815-16.) In *Roper* and *Graham*, the Supreme Court has acknowledged

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[11]Michelle Leighton & Connie de la Vega, Sentencing Our Children to Die in Prison: Global Law and Practice, U.S.F.L. Rev . 983, 1002 (2008).

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.*)

A recent review of the relevant brain science notes "an explosion of studies examining the neurobiology of adolescence." (Leah H. Somerville

& B.J. Casey, Developmental Neurobiology of Cognitive Control and Motivational systems, 20 Current Op. in Neurobiology, September 2010, at 236-241.) The studies, the authors observe, have focused on "evaluating the hypothesis that during adolescence, unique patterns of brain activity arise that predict stereotypical aspects of adolescent behavior including risk-taking and sub-optimal decision-making in the face of incentives." Id. According to recent studies, the authors report, "adolescents show a unique sensitivity to motivational cues that challenges the less mature cognitive control system, resulting in an imbalance between these systems and ultimately patterns of behavior that are unique to adolescents." Id. (Emphasis added.)

Studies also show that preference for immediate rewards and sensation-seeking peak around ages 14 and 16 and then decline. (Lawrence Steinberg, Should the Science of Adolescent Brain Development Inform Public Policy? 64 Am. Psychologist, November 2009, at 745 (November 2009). Impulse control, anticipation of future consequences, strategic planning and resistance to peer influence all increase linearly from preadolescence through late adolescence. The compelling and simply stated result of this research: Juveniles are different. (*Id.* at 746.)

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.

(130 S.Ct. at 2026.) This Court must consider the culpability of the offenders as well as the severity of their punishment. *Roper* and *Graham*, in their essence, recognize that juveniles are less culpable than adults. (*Graham*, *supra,* 130 S.Ct. at 2026; *Roper, supra*, 543 U.S. at 575.) The Supreme Court recognized:

> As compared to adults, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility' "; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offenders whose crime reflects irreparable corruption."

(*Graham v. Florida, supra*, 130 S.Ct. at 2026, quoting *Roper, supra*, 543 U.S. at 569-573). Punishment, therefore, should reflect the ambiguity regarding motivation and culpability in the commission of a crime. A juvenile's culpability for the same crime is innately less than an adult's because "from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a great possibility exists that a minor's character deficiencies will be reformed." (*Roper, supra*, 543 U.S. at 570.) This basic tenet holds true even when a juvenile commits the most heinous of crimes, homicide.

The severity of the punishment-life in prison without the possibility of parole-is the second most severe penalty of all and is the most severe that exists for juveniles. Although the state does not execute the juvenile, the sentence "alters the offender's life by a forfeiture that is irrevocable." (*Graham, supra*, 130 S.Ct. at 2027.) 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*, 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. *(Graham, supra*, 130 S.Ct. at 2027; *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.

The penological goals of retribution, deterrence, incapacitation and rehabilitation are also relevant to the analysis as "a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense" and cruel and unusual. (*Graham, supra*, 130 S.Ct. at 2028.) Here, retribution does not justify the imposition of life without parole. To be a legitimate sentencing goal, retribution must be "directly related to the personal culpability of the criminal offender." (*Tison v. Arizona* (1987) 481 U.S. 137, 149.) A juvenile's culpability, even for homicide, is substantially less than an adult's. (*Roper, supra*, 543 U.S. at 570.) Imposing the most severe non-death punishment on a juvenile is not proportional to a juvenile's culpability. Likewise, deterrence is not sufficient to justify life without parole. Science establishes that juveniles have diminished capacity to evaluate the long-term consequences of their behavior as well as an increased tendency to engage in risk-taking behavior. (*Graham, supra*, 130 S.Ct. at 2028-29; Steinberg, Should the Science of Adolescent Brain Development Inform Public Policy? at 246-41.) This inability to consider the consequences of behavior illustrates the limited impact of punishment as a deterrent. Any limited deterrent effect provided by life without parole,

therefore, is insufficient to justify it as a penological goal. (See *Graham, supra*, 130 S.Ct. at 2029.)

"The state is not required to guarantee eventual freedom," the Supreme Court said in *Graham,* referring to nonhomicide juvenile offenders and noting the lack of a meaningful opportunity to demonstrate "maturity and rehabilitation." (130 S.Ct. at 2030.) But, in any case, it is cruel and unusual punishment to deny the juvenile offender the possibility that he might redeem himself. Life in prison without parole for a juvenile may be worse than the death penalty. Society's treatment of minors in the criminal justice system reflects an evolving standard of decency, a standard that science reinforces. Juveniles, whether sentenced for homicide or other offenses, are significantly less culpable than adults. Sentencing a juvenile offender to spend his life in prison without the possibility of parole is cruel and unusual punishment and violates the Eighth Amendment.

CONCLUSION

For all the reasons stated above, appellant asks that the life without parole sentence be vacated, or at minimum, that the matter be remanded to the superior court for new sentencing proceedings that provide him a full opportunity to demonstrate that due to considerations required under *Miller*, a life without parole sentence violates the Eighth Amendment.

Dated: April 9, 2013

Respectfully submitted,

/s/

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I hereby certify that the Opening Brief on the Merits contains 10309 words according to the word count of the WordPerfect computer program used to prepare the document.

Dated: April 9, 2103

/S/

Jean Matulis
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PROOF OF SERVICE BY MAIL

People v. Luis Angel Gutierrez Case No. S206365
California Court of Appeal, Second App. Dist., Div. Six, No. B227606
Ventura Superior Court No. 2008011529

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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 April 9, 2013.

/s/

Jean Matulis