In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ANDREW LAWRENCE MOFFETT,** **Defendant and Appellant.**	Case No. S206771

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

RESPONDENT'S OPENING BRIEF

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ISSUE PRESENTED FOR REVIEW

Does Penal Code section 190.5, subdivision (b), violate the prohibition on mandatory terms of life without parole for minors set forth in *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455]?[1]

INTRODUCTION

Penal Code section 190.5, subdivision (b), provides that defendants who were 16 or 17 years old when they committed special circumstance murder shall be sentenced to life without the possibility of parole (LWOP) "or, at the discretion of the court, 25 years to life." Here, the trial court stated that there was no reason to deviate from the presumptive term and sentenced Moffett to LWOP. While Moffett's appeal was pending in the Court of Appeal, the Supreme Court decided *Miller v. Alabama*, *supra*, 567 U.S. __ [132 S.Ct. 2455] (*Miller*). *Miller* held that mandatory LWOP terms for minors violated the Eighth Amendment.

The Court of Appeal held that Moffett's sentence violated *Miller* because California's presumptive LWOP sentence was tantamount to a mandatory term. The Court of Appeal was mistaken. Penal Code section 190.5, subdivision (b), is plainly not mandatory because it gives trial courts

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[1] On January 3, 2013, this Court granted review in the present matter, *People v. Moffett* (2012) 209 Cal.App.4th 1465 [148 Cal.Rptr.3d 47, 51–53], S206771, and in *People v. Gutierrez* (2012) 209 Cal.App.4th 646 [147 Cal.Rptr.3d 249], S206365. This Court limited the issue to be briefed and argued in *Gutierrez* to the same issue presented here. On January 14, 2013, respondent filed a petition for review regarding the same issue in *People v. Siackasorn*, S207973, partially published at (2012) 211 Cal.App.4th 909. Respondent requested that this Court grant and hold the petition pending resolution of *Moffett* and *Gutierrez*. Siackasorn filed a petition for review the next day. This Court had not ruled on those petitions for review at the time respondent filed this opening brief.

the discretion to impose the lesser term of 25 years to life.[2] Furthermore, contrary to the Court of Appeal's opinion, California's presumption in favor of LWOP for juvenile special circumstance murderers does not violate "the spirit" of *Miller*. *Miller* held that mandatory LWOP terms were improper because they compelled the harshest sentence for juveniles without giving sentencing courts an opportunity to reduce the term based on the juvenile's immaturity or the nature of the crime. However, California law specifically directs sentencing courts to consider a minor's age and the circumstances of the crime, among other factors, before imposing sentence. And the trial court below did so before expressly deciding not to use its discretion to impose the lesser term.

Finally, *Miller* specifically cited section 190.5, subdivision (b), as an example of a *non*-mandatory sentencing scheme that did not violate its new rule. Accordingly, the Court of Appeal overreached when it ruled California's sentencing scheme for juvenile special circumstance murderers was unconstitutional.

STATEMENT OF THE CASE

A. The Robberies at the Raley's Supermarket

On April 23, 2005, the Raley's supermarket in Pittsburg held a grand reopening celebration. It was a busy day and most of the checkout stands were in use. There was a Wells Fargo Bank in the front corner of the store and two bankers helped customers at the counter. (22RT 5032, 5040–5041, 5155–5159; 23RT 5217–5221, 5236, 5279, 5282, 5239, 5280.)[3]

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

[3] The Court of Appeal (Case No. A133032) granted appellant's request for judicial notice of the record in his previous appeal (Case No. A122763). References to Clerk's and Reporter's Transcripts with volume

(continued...)

Moffett and codefendant Alexander Hamilton planned to rob the Raley's and the Wells Fargo Bank. Moffett enlisted Elijah Moore to steal a getaway car in exchange for some marijuana. The morning of April 23, 2005, Moore stole a white Toyota Camry from Crestview Lane in Pittsburg. Moore drove the car to Crowley Avenue and turned it over to Moffett. Moffett was with Hamilton and Irving Griffin and they all got in the car. Moffett gave Moore some marijuana and drove away. Moffett dropped off Griffin and drove himself and Hamilton to the Raley's parking lot. (25RT 5715–5719, 5748, 5757–5769, 5790.)

Moffett put the hood of his sweatshirt over his head and put latex gloves on his hands; he tied a white T-shirt over his face; and he armed himself with a fully loaded semiautomatic 9 millimeter Lorcin pistol. Hamilton also put latex gloves on his hands, and he put a black mask or beanie over his face. Hamilton armed himself with a fully loaded semiautomatic 9 millimeter Glock pistol. (22RT 5162, 5174, 5216; 23RT 5226, 5273, 5275, 5284, 5317, 5346, 5370, 5376, 5415–5416, 5421, 5424; 24RT 5473; 25RT 5816–5818, 5870, 5880; 26RT 5932, 5958, 5960, 5962, 5971, 5991; 26RT 6038; 27RT 6312, 6316; 28RT 6370–6380, 6384.)

At 5:47 p.m., Moffett and Hamilton ran into Raley's. Moffett went up to register seven and pointed his gun at cashier Rima Bosso. Moffett said, "'Give me the money.'" Bosso initially thought it was a coworker joking around. She asked, "'CJ, is that you?'" Moffett said, "'Bitch, I said give me the money.'" Many customers dropped to the floor. Bosso panicked and tried to open the register without completing her current transaction. Moffett put his gun up against her left ear, pushed her head with it, and

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numbers are to the record in the first appeal. References to transcripts without a volume number are to the second appeal.

repeated, "'Give me the money.'" He also commanded, "'Open the drawer, bitch. Open the drawer.'" But Bosso could not figure out what she was doing wrong. Moffett said, "'Come on, bitch. Come on, bitch. You're taking too fucking long.'" (22RT 5034, 5044, 5084, 5154–5156, 5161–5168, 5174, 5179, 5207; 23RT 5231–5232, 5334, 5340, 5347, 5349–5351, 5371–5372, 5396; 26RT 6008, 6029.)

When Moffett asked another employee what he was looking at, Bosso suddenly realized what she had been doing wrong and opened the register. When the drawer opened, Moffett put a white plastic grocery bag next to it and Bosso put about $800 in the bag. Bosso closed her eyes because she thought Moffett would shoot her; but when she opened her eyes he had already run away. She fell to the floor and cried hysterically. A customer service manager called 9-1-1. (22RT 5168–5175; 23RT 5337.)

Meanwhile, Hamilton had turned left at the Raley's entrance and ran to the Wells Fargo Bank. Anjila Sanehi and Adrianna Beaman were sitting at the counter helping customers. Hamilton ran to a short door beside the bank counter and tried to enter, but it was locked. Then he ran up between the two customers; he held his gun sideways with his finger on the trigger, and he alternated pointing it at Sanehi and Beaman. He initially focused on Beaman and said, "'Bitch, give me the money . . . . Bitch, give me the money, or I will shoot you.'" (22RT 5044, 5084, 5174; 23RT 5222, 5224–5231, 5241, 5269, 5277, 5283–5286, 5296, 5308, 5311, 5321, 5359.)

Beaman froze for a moment; then she opened her cash drawer and put money into Hamilton's plastic grocery bag. Hamilton said, "'Hurry up. Hurry up. You fucking [b]itch. Hurry up. Give me all your money.'" Hamilton ran back and forth between the two bankers and Sanehi also put money into the bag. The bankers gave Hamilton over $3000, including bait money. (23RT 5231–5235, 5253, 5270–5271, 5285–5289, 5312–5315, 5322–5323.)

B. Moffett's and Hamilton's Flight

Moffett and Hamilton ran toward the store exit and Hamilton said, "'Go, go, go.'" They ran out of Raley's and dropped some money just outside the exit. They ran to the Camry and Moffett got into the front passenger seat. Hamilton got into the driver's seat and drove northeast. (22RT 5076–5077; 23RT 5236, 5287, 5316, 5338, 5352–5353, 5376–5377.)

Hamilton accelerated to about 70 miles per hour and could not negotiate a turn. The Camry crashed into the back of a large pickup truck parked in front of 1692 Norine Drive. The Camry suffered severe front body damage including a crumpled hood and a shattered front windshield. It came to rest on the lawn. (22RT 5085–5087, 5090; 23RT 5399–5400, 5414; 26RT 6022; 28RT 6357–6358, 6388–6389.)

Moffett stumbled out of the passenger door and dropped his gun on the ground. He fumbled with it a couple of times before picking it up and tucking it into his waist. Hamilton got out of the car a few seconds later and followed Moffett. They ran through the cul de sac at the eastern end of Woodland Drive. A neighbor chased them and tried to grab Hamilton, but another neighbor yelled that they had guns. At the same time, Moffett reached toward his body and said, "Stop or I'll cap you, Mother fucker.'" The first neighbor backed away and another neighbor called 9-1-1. (22RT 5104; 23RT 5401–5404, 5410, 5414–5417, 5423–5424.)

Meanwhile, numerous police officers responded to Raley's, and other officers drove to likely escape routes. Information about the car crash was quickly broadcasted and officers responded to that area. A helicopter was dispatched at 5:55 p.m. (22RT 5026–5028, 5037–5038; 24RT 5448–5449.)

Moffett led Hamilton through several yards; Moffett scaled the fences easily while Hamilton struggled over them. They came out on a north-south pedestrian access trail. They turned right onto the Delta de Anza

trail. The trail had a straight dirt path which was parallel and south of a serpentine paved path. Moffett and Hamilton continued eastward a short distance. They hid by some trees east of the access trail and south of the Delta de Anza Trail dirt path. (23RT 5402–5406, 5409, 5416, 5418; 25RT 5814–5815, 5822, 5825; 26RT 5958–5959, 5963–5971; 26RT 6023; 27RT 6322–6327; 28RT 6370.)

Meanwhile, Pittsburg Police Officers John Florance and Larry Lasater had each entered Los Medanos College and had driven as far southeast as they could. They exited their vehicles and ran south on the muddy access trail and arrived at the Delta de Anza trail at 5:58 p.m. Officer Florance walked west and Officer Lasater walked east. (24RT 5452–5454; 26RT 6022.)

At 6:00 p.m., Officer Lasater saw Moffett next to a tree. He called out, "'Is that someone down there?'" Officer Florance saw Moffett's dark figure for a moment and told dispatch. Moffett and Hamilton ran off and Officer Lasater chased them east on the dirt path; he shouted he was following a Black male with a black sweatshirt. Officer Florance followed behind and radioed in that they were chasing a "black male, dark shirt, hitting fences." (24RT 5455–5458, 5496, 5510; 26RT 6023.)

C. The Murder of Officer Lasater and Hamilton's Arrest

After a couple hundred yards, Officer Lasater stopped suddenly. He drew his weapon and approached the tall grass south of the Delta de Anza trail dirt path. Officer Lasater walked slowly heel-to-toe with his pistol held in front of him and slightly downward. Officer Florance stayed several feet back. Officer Lasater lowered his pistol and pointed it at

Moffett who was lying in the grass about four feet ahead of him.[4] (24RT 5459–5463, 5496, 5509–5510.)

Officer Lasater said, "'Show me your hands.'" Hamilton, who was lying in the bushes 15–20 feet southeast of Lasater, shot four rounds at Officer Lasater. One bullet hit the officer in the neck, shattered a vertebrae, and caused instant paralysis and extensive internal bleeding from the vertebral artery. Another bullet went through his lower right calf. Officer Lasater collapsed to the ground and lay motionless on his back. At 6:01 p.m., Officer Florance radioed in "'shots fired.'" Then he moved closer and saw that Officer Lasater was on the ground. He radioed, "'Officer down, 1199.'" Contra Costa County Fire Captain John McNamara called for a medical helicopter. (22RT 5038–5039, 5093, 5105; 23RT 5409; 24RT 5462–5465, 5477, 5497–5498, 5503, 5579; 25RT 5689; 26RT 6018, 6023, 6075; 28RT 6413, 6443–6444; 29RT 6603.)

Moffett immediately got up and ran south toward 4500 Reimche Street. He dropped his cell phone on the ground and left his sweatshirt on the north (trail) side of a fence. He scaled the fence, ran through the yard, and knocked over a garbage can. Hamilton scampered 40 feet to the east and lay down in the tall grass with his pistol facing in Officer Lasater's direction. Officer Florance called out to Officer Lasater, but he responded only with the sound of gurgling on his own blood. (24RT 5465; 25RT 5849–5859, 5865; 26RT 5948–5949; 26RT 6091; 27RT 6140, 6150–6159, 6165–6166.)

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[4] During his opening statement, the prosecutor said the evidence would show that Office Lasater approached Moffett while he was lying in the grass. (21RT 4949.) However, during closing argument, he speculated that Moffett had already fled over a fence and the officer actually saw Moffett's sweatshirt hanging on that fence. (31RT 7043, 7103; 32RT 7217.) However, the evidence for the prosecutor's original theory was far stronger.

Several officers joined Officer Florance. (22RT 5038–5039, 5093; 24RT 5465–5469, 5498–5499, 5526, 5533–5543, 5579–5583.) At 6:05 p.m., Officers Florance and Phil Galer slowly walked toward Officer Lasater with weapons drawn while Officer Les Galer covered them with his rifle. When they got within a few feet of Officer Lasater, Hamilton fired four shots that hit the ground near them. The officers dove backward and returned fire. The officers made their way back behind a patrol car. (22RT 5040, 5097–5099; 24RT 5469–5471, 5544–5547, 5556–5557, 5562, 5584–5588, 5623, 5638; 26RT 6018; 27RT 6183, 6186–6188.)

The officers kept yelling toward the brush for the suspects to come out. Hamilton was out of ammunition, so he dropped his gun and crawled out of the grass. The officers yelled various commands to show his hands and drop on the ground. Hamilton eventually got up and walked towards the patrol cars. Officers took him into custody. (22RT 5042, 5057, 5059, 5100–5102, 5135, 5148; 24RT 5472–5474, 5547–5548, 5564, 5588–5590, 5627–5630; 26RT 6019–6020, 6037; 27RT 6166.)

Believing the other suspect was still in the brush, officers obtained a ballistic shield to protect them as they went to help Officer Lasater. They picked up Lasater and carried him to where medical personnel were waiting. An ambulance took Officer Lasater to a helicopter. Then the helicopter took him to John Muir Medical Center in Walnut Creek. (22RT 5040, 5106–5107, 5137; 24RT 5474–5480; 5550–5554, 5593–5597, 5639; 25RT 5691–5698; 26RT 6019, 6031, 6038–6039; 27RT 6168.) Officer Lasater underwent several medical procedures over many hours, but he was declared brain dead the next day. (26RT 6031–6032, 6074–6076, 6094–6097; 28RT 6432, 6445–6446.)

D. Moffett's Flight and Arrest

Meanwhile, Moffett continued running through various backyards. At 2606 Desrys Boulevard he buried his Lorcin pistol in a planter. Moffett ran

to 2610 Desrys Boulevard and removed his black T-shirt. He put the T-shirt and the bag containing $4,027 into a garbage can. Moffett continued running south while carrying the white T-shirt he had used as a mask. (25RT 5870, 5884, 5897–5899; 26RT 5924–5925, 5974, 5977–5978, 5981; 26RT 6070–6074, 6087; 27RT 6200–6206; 28RT 6486–6488, 6529–6530.)

Moffett passed through several more yards. Then he ran into the garage at 4414 Null Drive. The owner was inside and she yelled, "'[N]o.'" Moffett turned around and ran east through the yard at 2630 Desrys Boulevard. The owner of that house saw Moffett and contacted police who were searching the area. An officer spotted Moffett standing in the front yard and briefly chased and lost him. Moffett continued south and went into the backyard at 4405 Null Drive. He curled up on the ground under a tree. Soon thereafter, at 6:35 p.m., officers found Moffett and arrested him. (25RT 5869, 5870, 5877–5878, 5883–5885; 26RT 5926–5930, 5945, 5982–5987; 26RT 6015, 6020.)

E. The Trial

Due to the nature of the crimes, and the fact that Moffett committed the crimes when he was just four days shy of his eighteenth birthday, the prosecutor charged him as an adult pursuant to Welfare and Institutions Code section 707, subdivisions (b), (d)(1). (17CT 4668 [probation officer's report indicates appellant's date of birth was April 27, 1987].)

An information charged Moffett and codefendant Hamilton with seven counts. Count one charged both with first degree murder (§ 187), 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 only, a lying-in-wait special circumstance (§ 190.2, subd. (a)(15)). Counts two, three, and four charged both with second degree robbery (§§ 211, 212.5, subd. (c)). Counts five and six charged Hamilton with premeditated attempted murder (§§ 187, 664). And Count 7 charged

both with unlawful taking or driving a vehicle (Veh. Code, § 10851, subd. (a)). Counts one through four alleged that Moffett personally used a firearm (§ 12022.53, subd. (b)). Counts one through six alleged that Hamilton personally used and discharged a firearm (§ 12022.53, subds. (b), (c), (d)). (4CT 994–1000.)

On August 13, 2007, the jury found both 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 Moffett to 24 years plus LWOP. (17CT 4655–4660; 34RT 7759–7764.)

F. Moffett's First Appeal and Resentencing

Moffett appealed his judgment and respondent conceded error regarding the true finding on the peace-officer special circumstance and the term imposed on the three robbery counts. The Court of Appeal agreed with respondent's concessions and remanded for resentencing. The court affirmed in all other respects.

On July 22, 2011, the trial court resentenced appellant to the same term of 24 years plus LWOP. (CT 108–109, 114–117; RT 73–78.)

G. Moffett's Second Appeal

Appellant filed his second notice of appeal on August 16, 2011. On June 25, 2012, the Supreme Court issued its opinion in *Miller*, 132 S.Ct. 2455. The Court of Appeal requested supplemental briefing on whether *Miller* precluded Moffett's LWOP sentence. On October 12, 2012, the Court of Appeal issued a published opinion in which it held that the presumptive LWOP sentence provided in section 190.5, subdivision (b),

violated the Eighth Amendment under *Miller*. The Court of Appeal vacated the sentence and remanded the matter so the trial court could resentence appellant without any presumption in favor of choosing the LWOP term over 25 years to life. It also ordered the trial court to impose the proper term for the three robbery counts. (*People v. Moffett* (2012) 209 Cal.App.4th 1465 [148 Cal.Rptr.3d 47, 51–53] (*Moffett*), review granted in S206771, on January 3, 2013.)

This Court granted respondent's petition for review on January 3, 2013.

SUMMARY OF THE ARGUMENT

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 (*Ybarra*); *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1145 (*Guinn*) ["Penal Code section 190.5 provides a presumptive penalty of LWOP for a 16- or 17-year-old special circumstances murderer . . . ."].)

In *Miller*, the Supreme Court held that *mandatory* LWOP sentences for minors violate the Eighth Amendment because mandatory terms do not give sentencing courts the opportunity to consider "their age and age-related characteristics and the nature of their crimes." (*Miller*, *supra*, 132 S.Ct. at p. 2475.) But even though California law requires sentencing courts to consider those and other factors (see § 190.3; California Rules of Court, rule 4.423); and *Miller* specifically cited section 190.5, subdivision (b), as an example of a *non*-mandatory sentencing scheme (*Miller*, at p.

2471, fn. 10.); the Courts of Appeal have split over whether the statute violates *Miller*.

Nevertheless, it is clear that California does not have a mandatory LWOP term for juveniles. Penal Code section 190.5 gives trial courts the discretion to impose the lesser sentence of 25 years to life with the possibility of parole. Trial courts are required to consider various circumstances before imposing sentence. And while no reasonable consideration is excluded, the sentencing criteria set forth in Penal Code section 190.3 and California Rules of Court, rules 4.420, 4.421, and 4.423 go far beyond the factors required in *Miller*.

Miller noted, "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year–old . . . ." (*Miller*, *supra*, 132 S.Ct. at p. 2467.) But, of course, California's law has none of the characteristics attendant to a mandatory penalty. California trial courts are required to take account of an offender's age and various other characteristics; they cannot impose LWOP on minors under the age of 16; and they have the discretion to impose a lesser term. Therefore, California's sentencing scheme is easily distinguishable from the mandatory ones considered in *Miller*.

Miller also expressed the opinion that its individualized sentencing requirement would make LWOP sentences for juveniles "uncommon." (*Miller*, *supra*, 132 S.Ct. at p. 2469.) The Court of Appeal below opined that California's presumptive LWOP term violated the spirit of *Miller* because it made such terms more likely. (*Moffett*, *supra*, 148 Cal.Rptr.3d at p. 55.) However, the Court of Appeal again disregarded *Miller's* own words in purporting to divine its "spirit." California has not made LWOP sentences common for juvenile murderers. On the contrary, the laws in

place already make it a rare punishment. Indeed, California already excludes LWOP as a punishment for several classes of juveniles that *Miller* clearly left undisturbed. Thus, California does not authorize LWOP sentences for juveniles under 16 years of age; nor for juveniles convicted of second degree murder; nor for juveniles convicted of first degree murder. LWOP is *only* available for juveniles who are 16- or 17-years old; who have been found guilty of first degree murder; and who have had a true finding on a special circumstance. Moreover, even after all of those conditions have been met, California still gives trial courts broad discretion to impose a lesser term.

Miller, itself, referred to empirical evidence that LWOP was, in fact, a rare punishment for juveniles in California. (*Miller*, *supra*, 132 S.Ct. at p. 2471, fn. 10.) Thus, the sentencing scheme discussed above does not just make the imposition of LWOP sentences theoretically less common. According to the data used by the Supreme Court, California's sentencing scheme makes LWOP terms for minors uncommon in fact. (*Ibid.*)

Finally, *Miller* noted that an important reason to limit the imposition of LWOP terms on juveniles arose from the difficulty of distinguishing between "'transient immaturity . . . and the rare juvenile offender whose crime reflects irreparable corruption.'" (*Miller*, *supra*, 132 S.Ct. at p. 2469, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 573.) However, it seems evident that this difficulty necessarily decreases as a minor approaches the age of majority and reveals more of his character. As noted above, California only makes LWOP terms available for the oldest juveniles. Moreover, in the present matter, Moffett's criminal history; his aggressive and threatening behavior during the commission of the crimes charged; his lack of remorse; and his proximity to his eighteenth birthday were all factors that made Moffett's circumstances and appropriate for the harshest penalty available for minors.

ARGUMENT

I. PENAL CODE SECTION 190.5, SUBDIVISION (B), DOES NOT VIOLATE *MILLER V. ALABAMA* BECAUSE IT GIVES TRIAL COURTS DISCRETION TO IMPOSE A LESSER TERM BASED ON INDIVIDUALIZED SENTENCING CONSIDERATIONS

Section 190.5, subdivision (b), provides that the term for defendants who commit special circumstance murder when they are 16 or 17 is "confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." The Courts of Appeal have interpreted that statute as making LWOP the presumptive term, while also giving sentencing courts the discretion to impose the lesser term of 25 years to life. (See *Ybarra*, *supra*, 166 Cal.App.4th at p. 1089; *Guinn*, *supra*, 28 Cal.App.4th at pp. 1141–1142.)

Miller held that a sentencing court could sentence a juvenile murderer to LWOP on two conditions: First, it must consider the defendant's level of maturity and the nature of the crime. Second, the sentencing court must have the discretion to impose a lesser term. (*Miller*, *supra*, 132 S.Ct. at p. 2460.) It is clear that section 190.5, subdivision (b), meets those criteria. Indeed, *Miller* itself cited section 190.5, subdivision (b), as an example of a permissible non-mandatory sentencing scheme. (*Id.* at p. 2471, fn. 10.) Nevertheless, the Courts of Appeal have split on whether section 190.5, subdivision (b), violates *Miller*. (See *Moffett*, *supra*, 148 Cal.Rptr.3d at p. 55 [LWOP presumption violated *Miller*]; *People v. Siackasorn* (2012) 211 Cal.App.4th 909 (*Siackasorn*), petition for review pending [same]; *People v. Gutierrez*, *supra*, 209 Cal.App.4th 646 [147 Cal.Rptr.3d 249], review granted in S206365, on January 3, 2013 (*Gutierrez*) [LWOP presumption did not violate *Miller*].) But as discussed below, nothing in *Miller* can reasonably be said to cast doubt on the validity of section 190.5, subdivision (b).

A. California Requires Sentencing Courts to Consider Mitigating Circumstances, Including the Age of the Defendant

Miller holds that courts cannot impose an LWOP term on a minor without first considering the defendant's personal circumstances and whether that warrants a reduced term: "*Roper v. Simmons* held that the Eighth Amendment bars capital punishment for children, and *Graham v. Florida* [2010] 560 U.S. ___, 130 S.Ct. 2011, concluded that the Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a nonhomicide offense. *Graham* further likened life without parole for juveniles to the death penalty, thereby evoking a second line of cases. In those decisions, this Court has required sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978 (plurality opinion). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life without parole for juveniles violates the Eighth Amendment." (*Miller*, *supra*, 132 S.Ct. at p. 2458.)

Further, *Miller* struck down mandatory LWOP sentences for minors because "[s]uch 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, and run afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." (*Miller*, *supra*, 132 S.Ct. at p. 2460; see *id.* at p. 2472, fn. 11 ["We hold that the sentence violates the Eighth Amendment because, as we have exhaustively shown, it conflicts with the fundamental principles of *Roper, Graham*, and our individualized sentencing cases."].)

Unlike the mandatory statutes at issue in *Miller*, section 190.5, subdivision (b), does not prevent a sentencing court from considering a juvenile's individualized circumstances. On the contrary, implicit in the discretion to impose the lesser term of 25 years to life is the *obligation* to consider individualized sentencing factors. (See *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978; *Ybarra, supra*, 166 Cal.App.4th at p. 1089.)

Moreover, *Miller* prohibited mandatory LWOP terms for juveniles because they make no allowance for individualized sentencing. That simply cannot be said for section 190.5, subdivision (b). The LWOP presumption does not eliminate the need for the sentencing court to make an individualized sentencing determination. "Despite that statutory preference, 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.'" (*Ybarra, supra*, 166 Cal.App.4th at p. 1089, quoting *Guinn, supra*, 28 Cal.App.4th at p. 1149; see *Wasman v. United States* (1984) 468 U.S. 559, 563 [104 S.Ct. 3217, 3220] ["It is now well established that a judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence. The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed."].)

Miller extended the requirement for individualized sentencing in capital cases to juvenile LWOP cases because they each represent the ultimate penalties available. (*Miller, supra*, 132 S.Ct. at pp. 2460, 2469–2470; see *id.* at p. 2466 ["because we viewed this ultimate penalty for

juveniles as akin to the death penalty, we treated it similarly to that most severe punishment."].) This Court has already applied the same logic to California's sentencing laws: "[S]ince all discretionary authority is contextual, those factors that direct similar sentencing decisions are relevant, including 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.'" (*People v. Superior Court* (*Alvarez*), *supra*, 14 Cal.4th at p. 978.)

It is well established that when a statute vests discretion in a court, that discretion is never unbridled. The discretion "'is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. [Citations.]' (*People v. Warner* (1978) 20 Cal.3d 678, 683, 143 Cal.Rptr. 885.) 'Obviously the term is a broad and elastic one [citation] which we have equated with "the sound judgment of the court, to be exercised according to the rules of law." [Citation.]' (*People v. Russel* (1968) 69 Cal.2d 187, 194, 70 Cal.Rptr. 210, 443 P.2d 794.) Thus, '[t]he courts have never ascribed to judicial discretion a potential without restraint.' (*Ibid.*) 'Discretion is compatible only with decisions 'controlled by sound principles of law, . . . free from partiality, not swayed by sympathy or warped by prejudice . . . ." [Citation.]' (*People v. Bolton* (1979) 23 Cal.3d 208, 216, 152 Cal.Rptr. 141.) '[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.'" (*People v. Superior Court* (*Alvarez*), *supra*, 14 Cal.4th at p. 978.)

As both *Guinn* and *Ybarra* point out, section 190.5, subdivision (b), "requires" the exercise of discretion; and that discretion necessarily

involves the consideration of mitigating circumstances. (*Ybarra*, 166 Cal.App.4th at p. 1089; *Guinn*, *supra*, 28 Cal.App.4th at p. 1149.)

Before imposing LWOP on juveniles pursuant to section 190.5, subdivision (b), sentencing courts must abide by both the Rules of Court and the Penal Code. Rule 4.423 lists factors in mitigation that relate to the crime (subdivision (a)) and the defendant (subdivision (b)). The Courts of Appeal have established that these determinate sentencing factors apply to the discretion provided in section 190.5, subdivision (b): "'The factors listed in [former] rules 421 [4.421] and 423 [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.'" (*Ybarra*, *supra*, 166 Cal.App.4th at p. 1089, quoting *Guinn*, *supra*, 28 Cal.App.4th at p. 1149, 33 Cal.Rptr.2d 791; Rule 4.409 ["Relevant criteria enumerated in these rules must be considered by the sentencing judge . . . ."]; Cal. Rules of Court, Rule 4.410 ["The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and *the facts and circumstances of the case*." (Italics added.)].)

Likewise, the aggravating and mitigating factors set forth in section 190.3 apply not only to adults eligible for capital punishment, but 16- and 17-year-olds facing the ultimate juvenile penalty—LWOP. Just as *Miller* relied on its capital case jurisprudence to inform its decision about juveniles facing LWOP, California's capital punishment guidelines are also applicable to the ultimate juvenile sentence. Thus, *Guinn* and *Ybarra* both recognized that "the factors stated in section 190.3 are available, to the extent relevant to an exercise of discretion to grant leniency, as guidelines under section 190.5." (*Ybarra*, *supra*, 166 Cal.App.4th at p. 1092; *Guinn*, *supra*, 28 Cal.App.4th at pp. 1142–1143.)

In particular, *Miller* emphasized, "'An offender's age . . . is relevant to the Eighth Amendment,' and so 'criminal procedure laws that fail to take

defendants' youthfulness into account at all would be flawed.'" (*Miller*, *supra*, 132 S.Ct. at p. 2466.) Indeed, *Miller* notes that youth is the "most fundamental" consideration "in determining the appropriateness of a lifetime of incarceration without the possibility of parole." (*Id.* at p. 2465.) But the mandatory penalty schemes at issue here prevent the sentence from taking account of these central considerations." (*Id.* at p. 2466.) However, section 190.5, subdivision (b), already gives sentencing courts the discretion to take youth into consideration. (See *Guinn*, *supra*, 28 Cal.App.4th at p. 1142 ["a court might grant leniency in some cases, in recognition that some youthful special-circumstance murderers might warrant more lenient treatment . . . ."].) Moreover, section 190.3, factor (i), specifically lists "[t]he age of the defendant at the time of the crime" as a relevant consideration. (*Miller*, *supra*, 132 S.Ct. at p. 2467 ["we insisted in these [previous] rulings that a sentencer have the ability to consider the 'mitigating qualities of youth.'"].)

Furthermore, unlike the mandatory LWOP terms considered in *Miller*, California puts no limit on a sentencing court's ability to consider relevant mitigating circumstances. (See Cal. Rules of Court, Rule 4.408 ["The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made."].)

It is also worth noting that *Miller* was concerned with "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*, 132 S.Ct. at p. 2469.) The juveniles in *Miller* were 14 years of age. However, California does not make LWOP available for juveniles who are under 16 years of age. (§ 190.5, subd. (b).) Moreover, it seems evident that the difficulty in distinguishing between immaturity and

"irreparable corruption" diminishes as the juvenile approaches adulthood. Surely, there is a far greater difference between 14- and 18-year olds, than between 17- and 18-year-olds. Indeed, Moffett was just four days shy of his 18th birthday. So the real-world significance of his youth was virtually nil.

Finally, *Miller* makes it clear that it is sufficient for trial courts to have "the opportunity" to consider mitigating factors. (*Miller*, *supra*, 132 S.Ct. at p. at p. 2475 ["*Graham, Roper,* and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."].) As discussed above, California's Penal Code, Rules of Court, and case law all make it clear that trial courts are *required* to consider relevant mitigating factors before determining whether to impose LWOP or 25 years to life pursuant to section 190.5, subdivision (b). And as discussed below, the sentencing court expressly did so before sentencing Moffett to LWOP. Thus, California's sentencing scheme affords a degree of individualized sentencing discretion that was completely absent from the mandatory LWOP terms struck down in *Miller*. Therefore, this Court should hold that section 190.5, subdivision (b), does not violate the Eighth Amendment.

B. California's Sentencing Scheme for Juvenile Special Circumstance Murderers Cannot Be Considered Mandatory Because the Sentencing Court Has the Discretion to Impose a Lower Term

The *Miller* opinion begins, "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.*" (*Miller*, *supra*, 132 S.Ct. at p. at p. 2460, italics added.) That is categorically not the case in California.

The plain language of section 190.5, subdivision (b), provides that trial courts have the discretion to impose a term of 25 years to life instead of LWOP. The only issue is whether the LWOP presumption is tantamount to the mandatory schemes struck down in *Miller* and, therefore, violates the Eighth Amendment. The simple answer is no. Throughout the opinion, *Miller* emphasized that trial courts must have the "opportunity" to make an individualized sentencing determination. (See *Miller*, *supra*, 132 S.Ct. at pp. 2467, 2469, 2475; cf. *id.* at p. 2461 [in one of the cases considered by *Miller*, the trial court noted, "'in view of [the] verdict, there's only one possible punishment . . . ."].) California provides that *opportunity* by requiring trial courts to consider mitigating circumstances, and by giving trial courts the discretion to impose a lesser term.

Miller's bar on mandatory LWOP terms for minors does not imply that lesser terms must be considered equally by sentencing courts. It means only that sentencing courts must have the discretion to impose a lesser term. Nothing in *Miller* prevents California from preferring LWOP terms for the most culpable of murder cases. California can prefer LWOP for the most egregious crime so long as LWOP is not mandatory for that crime. (See *Miller*, *supra*, 132 S.Ct. at p. at p. 2471, fn. 9 [limiting the ultimate penalty to a particular kind of murder does not cure the law's failure to consider a defendant's character or circumstances].)

In California, trial courts are *required* to decide *which* term to impose. And that consideration must be based on standard sentencing factors. (See *People v. Superior Court* (*Alvarez*), *supra*, 14 Cal.4th at p. 978 [even when a sentencing statute grants "broad generic" discretion, "'a determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest 'exceeds the bounds of reason.'"].) That clearly satisfies *Miller's* requirement that sentencing courts have the discretion to impose a term below LWOP when that is

appropriate based on various factors, including the defendant's age, immaturity, and the nature of the crime.

Because California's sentencing scheme is discretionary, *Miller*'s bar on mandatory LWOP terms is not violated. Again, it bears repeating that *Miller* expressly recognized that California is *not* one of the states that employs a mandatory LWOP term for juvenile homicide offenders; rather, pursuant to Penal Code section 190.5(b), California "make[s] life without parole discretionary for juveniles." (*Miller*, *supra*, 132 S.Ct. at p. 2471, fn. 10; see *City of Coronado v. San Diego Unified Port Dist.* (1964) 227 Cal.App.2d 455, 480 [even the Supreme Court's dicta deserves strong consideration from the state's courts].)

Even though California has expressed a preference for the maximum penalty for juveniles, "[t]he choice whether to grant leniency of necessity involves an assessment of what, in logic, would mitigate or not mitigate the crime," as informed by California Rules of Court, Rule 4.421 (aggravating circumstances) and Rule 4.423 (mitigating circumstances). (*Ybarra*, *supra*, 166 Cal.App.4th at pp. 1089–1092.) Unlike the statutes in Miller, section 190.5, subdivision (b), does not "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." (*Miller*, *supra*, 132 S.Ct. at p. 2467.) Therefore, California's sentencing scheme is not mandatory and does not violate *Miller*.[5]

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[5] *Gutierrez* held that section 190.5, subdivision (b), does not violate *Miller* because it is not mandatory. (*Gutierrez*, *supra*, 147 Cal.Rptr.3d at pp. 259–260.) It "vests sentencing courts with the discretion to sentence the defendant to a term of 25 years to life with possibility of parole." (*Id.* at p. 260.) And citing *Ybarra*, it noted that sentencing a juvenile pursuant to section 190.5, subdivision (b), "requires a proper exercise of discretion." (*Ibid.*) Gutierrez's analysis is not particularly long, but that is because its conclusion is straightforward: Section 190.5, subdivision (b), cannot be

(continued...)

C. This Court Should Not Disturb Prior Case Law Holding That LWOP is The Presumptive Term Under Section 190.5, Subdivision (b)

Section 190.5, subdivision (b), was enacted in 1990, and in 1994 *Guinn* held that the statute made LWOP the presumptive term for 16- and 17-year-olds who commit special circumstance murder. (*Guinn*, *supra*, 28 Cal.App.4th at pp. 1141–1142.) In 2008, *Ybarra* concurred with that interpretation. (*Ybarra*, *supra*, 166 Cal.App.4th at p. 1089; see *People v. Blackwell* (2011) 202 Cal.App.4th 144, 159 [134 Cal.Rptr.3d 608, 621], vacated and remanded by *Blackwell v. California* (2013) __ U.S. __ [2013 WL 57076].) Thus, the LWOP presumption was undisputed for over 20 years—until *Siackasorn* (mistakenly) ruled that *Miller* compelled a reinterpretation and abandonment of the LWOP presumption. (See *Siackasorn*, *supra*, 211 Cal.App.4th at pp. 912–916.) As argued below, *Siackasorn's* rejection of the *Guinn-Ybarra* interpretation may have been expedient. But it was neither necessary nor consistent with California's graduated sentencing scheme.

The last part of section 190.5, subdivision (b), provides that the sentence "*shall* be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." (Italics added.) *Guinn* reasonably interpreted the use of the word "shall" as making LWOP the presumptive term. (*Guinn*, *supra*, 28 Cal.App.4th at p. 1142.) It also found that "this construction is consistent with the history of Penal Code section 190.5, enacted as part of Proposition 115, the 'Crime Victims Justice Reform Act.'" (*Id.* at pp. 1141–1142 ["Penal Code section

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(...continued)
mandatory because trial courts are required to consider all relevant mitigating factors and they have discretion over which term to impose.

190.5 was amended specifically to make youthful offenders, who committed what would have been a death-eligible crime for an adult, subject to special circumstances and LWOP."].)

Siackasorn rejected *Guinn* and *Ybarra's* construction and held that section 190.5, subdivision (b), does not create a presumption in favor of sentencing defendants to LWOP. (*Siackasorn*, *supra*, 211 Cal.App.4th at pp. 912–916.) This Court should reject *Siackasorn*. It reinterprets the meaning of the statute solely to resolve a problem that does not exist. The LWOP presumption does not offend *Miller*.

Siackasorn gave five reasons for interpreting section 190.5, subdivision (b), as not making LWOP the presumptive term. First, it noted that "*Miller* stressed that LWOP is the 'harshest possible penalty' constitutionally available for a juvenile offender." (*Siackasorn*, *supra*, 211 Cal.App.4th at p. 915.) However, California has a logical and progressive sentencing scheme which seeks to punish special circumstance murderers more severely than first degree murderers. (See *Guinn*, *supra*, 28 Cal.App.4th at p. 1142 ["Statutes should . . . be construed with reference to the whole system of law of which they are a part."].) Section 190.5, subdivision (b), reasonably makes LWOP the presumptive term because, otherwise, special circumstance murderers would usually receive the same sentence as first degree murderers. (Cf. *People v. Smith* (2005) 35 Cal.4th 334, 370 [defendant entitled to lesser term when mitigating and aggravating factors are in equipoise].) Clearly, California's progressive sentencing scheme was designed to make the presumptive term greater for special circumstance murderers. (See *Guinn*, *supra*, 28 Cal.App.4th at p. 1142.)

Second, *Siackasorn* notes that LWOP should be uncommon for juveniles. (*Siackasorn*, *supra*, 211 Cal.App.4th at p. 915.) But as discussed above, *Miller* found that California's sentencing scheme already

makes LWOP terms for minors uncommon. (*Miller*, *supra*, 132 S.Ct. at p. 2471, fn. 10.)

Third, *Siackasorn* finds fault because "*Guinn's* interpretation of section 190.5(b) was based on *statutory* text, structure and history." (*Siackasorn*, *supra*, 211 Cal.App.4th at p. 915.) However, *Siackasorn* never suggests that *Guinn's* statutory interpretation was faulty. It asserts only that "[t]his statutory-based interpretation is trumped by *Miller* . . . ." (*Ibid.*) However, since *Guinn's* interpretation of section 190.5, subdivision (b), is compatible with *Miller*, there is no reason to abandon it. Similarly, *Siackasorn's* fifth reason, "that statutes should be interpreted whenever possible to preserve their constitutionality" (*ibid.*), fails for the same reason.

Siackasorn's fourth reason attempts to undermine *Guinn* by noting that it characterized section 190.5, subdivision (b), "as setting forth a '*generally mandatory* imposition of LWOP as the punishment for a youthful special circumstance murderer.'" (*Siackasorn*, *supra*, 211 Cal.App.4th at pp. 915, quoting *Guinn*, *supra*, 28 Cal.App.4th at p. 1142, italics added by *Siackasorn*.) However, *Siackasorn* construes that quotation in a simplistic way. It is obvious that a provision cannot literally be mandatory when it is immediately followed by an alternative. Moreover, later in the very same paragraph where *Guinn* referred to the "mandatory" sentence, it softens that description by calling it "generally mandatory" and then, finally, "presumptive." (*Guinn*, *supra*, 28 Cal.App.4th at p. 1142 ["LWOP is the presumptive punishment for 16 or 17-year-old special-circumstance murderers . . . ."].)

Later, *Guinn* restated, "We have construed Penal Code section 190.5 to require a proper exercise of discretion in choosing whether to grant leniency and impose the lesser penalty of 25 years to life for 16 or 17-year-old special circumstance murderers." (*Guinn*, *supra*, 28 Cal.App.4th at p. 1149.) Thus, *Guinn* did not literally consider the LWOP presumption to be

mandatory. It held only that there is a presumption in favor of LWOP which could be rebutted by circumstances in mitigation. (See *id.* at pp. 1142, 1149.)

On the other hand, *Moffett* rejected *Guinn's* construction of section 190.5, subdivision (b), because it "is contrary to the spirit, if not the letter, of *Miller*, which cautions that LWOP sentences should be 'uncommon' . . . . Treating LWOP as the default sentence takes the premise of *Miller* that such sentences should be rarities and turns that premise on its head by placing the burden on a youthful defendant to affirmatively demonstrates that he or she deserves an opportunity for parole." (*Moffett*, *supra*, 148 Cal.Rptr.3d at p. 55.)[6] However, it is *Moffett* that turns *Miller* on its head by emphasizing its "spirit" over its plain meaning.

Miller's holding is clear: It is unconstitutional to have mandatory LWOP terms for minors. When *Miller* noted that LWOP terms for minors should be "uncommon," it was simply opining on what naturally occurs when sentencing courts have discretion to impose a lesser term. (See *Miller*, *supra*, 132 S.Ct. at p. 2471, fn. 10 ["when given the choice, sentencers impose life without parole on children relatively rarely."].) In California, of course, sentencers do have that choice. (§ 190.5, subd. (b).)

Likewise, *Miller* recognized that California is already in the class of states that imposes LWOP terms on minors "relatively rarely." (*Miller*,

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[6] The First Appellate District, Division Five, decided both *Moffett* and *People v. Blackwell*, *supra*, 202 Cal.App.4th at p. 154 [134 Cal.Rptr.3d 608, 617], vacated and remanded by *Blackwell v. California*, *supra*, __ U.S. __ [2013 WL 57076].) *Blackwell* was decided before *Miller*, and the Supreme Court vacated and remanded it so the Court of Appeal could consider it in light of *Miller*. The Court of Appeal ordered the parties to submit supplemental briefing by March 29, 2013. Respondent notes that remand by the Supreme Court should not be viewed as an indication that *Miller* actually requires reversal.

supra, 132 S.Ct. at pp. at p. 2471, fn. 10.) After citing California as one of the 15 states without a mandatory LWOP term for minors, *Miller* noted that "only about 15% of all juvenile life-without-parole sentences come from those 15 jurisdictions . . . ." (*Miller*, *supra*, 132 S.Ct. at p. 2471, fn. 10; see Assem. Com. On Appropriations, Analysis of Sen. Bill No. 9 (2011–2012 Reg. Sess.) as amended August 15, 2011, p. 5 [as of June 2011, there were 293 prisoners in California serving LWOP terms for murders committed when they were 16- or 17-years-old].) In other words, California (with close to fifteen percent of the nation's population) plus fourteen other states produced just fifteen percent of all juveniles sentenced to LWOP terms. Thus, to the extent *Miller* wanted the exclusion of mandatory LWOP terms for minors to make that sentence "uncommon," the Supreme Court has concluded that California's sentencing scheme already achieves that goal.[7]

Even assuming that *Moffett's* spirit-based rather than law-based reversal can be appropriate, *Moffett* misunderstood the spirit of *Miller*. *Moffett* complains that the LWOP presumption places the burden on the defendant to "demonstrate that he or she deserves an *opportunity* for parole." (*Moffett*, *supra*, 148 Cal.Rptr.3d at p. 55, italics added.) However, the spirit of *Miller* is illuminated by its comparative quotation of *Graham*: "'A State is not required to guarantee eventual freedom,' but must provide 'some meaningful *opportunity* to obtain release based on demonstrated maturity and rehabilitation.'" (*Miller*, *supra*, 132 S.Ct. at p. 2469, italics

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[7] As of January 1, 2013, section 1170, subdivision (d)(2)(A)(i), allows most defendants serving LWOP sentences for crimes committed as minors to petition the court to resentence them to a term of life with parole after serving 15 years. If the LWOP sentence is not recalled, the defendant has three additional opportunities to petition for recall. (§ 1170, subd. (d)(2)(H).) The law is retroactive, but it does not apply in cases where the victim was a peace officer. (§ 1170, subds. (d)(2)(A)(ii), (J).) Because Moffett was convicted of killing a peace officer, he would not be eligible.

added.) Thus, *Moffett* completely misses *Miller's* essential point: a juvenile is entitled to an *opportunity* to gain release; therefore, only mandatory statutes that preclude any such opportunity violate *Miller*. (*Ibid.*) Section 190.5, subdivision (b), of course, provides that opportunity by giving trial courts discretion to impose a life term with the possibility of parole.

Further, *Miller* expressly did "not foreclose a sentencer's ability" to impose an LWOP term on minors. (*Ibid.*) It simply "require[]s it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Ibid.*, footnote omitted.) Thus, under California's discretionary scheme, the "sentencer . . . examine[s] all the[] circumstances before concluding that life without any possibility of parole [is] the appropriate penalty." (*Ibid.*)

In sum, *Siackasorn* and *Moffett* read *Miller* far too broadly and are too quick to jettison the LWOP presumption that had previously been undisturbed for over 20 years. This Court should not only uphold the LWOP presumption because it is well established, but because that is the reasonable and proper interpretation of the statute. Moreover, as explained in *Guinn*, the statutory history suggests that California voters wanted "to make youthful offenders, who committed what would have been a death-eligible crime for an adult, subject to special circumstances and LWOP." (*Guinn*, *supra*, 28 Cal.App.4th at p. 1141–1142.)

Currently, the penalty for second degree murder is 15 years to life, and the penalty for first degree murder is 25 years to life. (§ 190, subd. (a).) For adults, the penalty for special circumstance first degree murder is LWOP or death, and there is no presumption for either alternative. (§ 190.3.) However, in the context of 16- and 17-year-olds, LWOP is the only penalty that is available to punish special circumstance murderers more harshly than first degree murderers.

Section 190.5, subdivision (b), provides that—absent substantial mitigating circumstances—16- and 17-year-old special circumstance murderers would be punished more harshly than first degree murderers. Eliminating the LWOP presumption would turn that logical arrangement on its head: Absent substantial aggravating circumstances, special circumstance murderers would receive the *same* sentence as first degree murderers. (Cf. *People v. Smith*, *supra*, 35 Cal.4th at p. 370 [in deciding whether to impose LWOP or death on adult special circumstance murderers, jury must choose LWOP unless aggravating circumstances substantially outweigh mitigating circumstances].)

Again, even if the LWOP presumption places the burden of producing mitigating evidence on defendants, that still does not violate the spirit of *Miller*. *Miller* requires only the opportunity for a lesser term—not an even shot. (*Miller*, *supra*, 132 S.Ct. at p. 2469; see *Kansas* v. *Marsh* (2006) 548 U.S. 163, 165–166 ["requir[ing] the imposition of the death penalty when the sentencing jury determines that aggravating evidence and mitigating evidence are in equipoise" does not violate the Constitution]; see also *Miller*, at p. 2458 [noting that *Graham* had "likened life without parole for juveniles to the death penalty itself."].) In short, *Miller* never indicated that jurisdictions could not prefer LWOP terms for the most extreme class of juvenile murderers. It said that there must be a mechanism to impose a lesser term "when the circumstances most suggest it." (*Miller*, *supra*, 132 S.Ct. at p. 2468.)

Accordingly, for all the reasons discussed above, this Court should find that the LWOP presumption set forth in section 190.5, subdivision (b), is valid because it prefers—but does not require—a greater punishment for a more egregious crime.

II. THIS COURT SHOULD REVERSE THE COURT OF APPEAL AND REINSTATE MOFFETT'S LWOP SENTENCE

As discussed above, the LWOP presumption in section 190.5, subdivision (b), passes muster under *Miller* and the Eighth Amendment. Therefore, this Court should reverse the Court of Appeal's judgment and order it to reinstate Moffett's LWOP sentence.

However, even if the LWOP presumption violates *Miller*, this Court should still reverse. *Miller* expressly declined to invalidate all LWOP terms for minors. (*Miller*, *supra*, 132 S.Ct. at p. 2471.) Therefore, if the LWOP presumption in section 190.5, subdivision (b), is impermissible, the statute should be preserved without the presumption. (See *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 641 [permissible to interpret statute to preserve the statutory intent and constitutionality].) In that case, a remand is unnecessary because it is clear beyond a reasonable doubt that the trial court would have imposed the LWOP term even without the LWOP presumption.

There is no need to remand for resentencing when it can be shown beyond a reasonable doubt that a sentencing court would have imposed the same sentence if the error had not occurred. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Stringer v. Black* (1992) 503 U.S. 222, 230; *People v. Whitt* (1990) 51 Cal.3d 620, 647.) Here, the trial court held a full sentencing hearing; defense counsel and the prosecutor made their arguments; and the trial court explained why it did not believe it was appropriate to use its discretion to impose the lesser term.

More specifically, defense counsel argued that the trial court should not impose the LWOP term because Moffett was a minor, he was not the actual killer, and he had already left the area at the time of the shooting. (RT 67.) The trial court stated it had the discretion to impose the lower

term and it noted that Moffett was only slightly under 18 years of age at the time he committed the crimes. (RT 77.)

The trial court was swayed, however, by the following aggravating factors: (1) Moffett 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) Moffett was an active and aggressive participant in the crimes leading up to the shooting. (*Ibid.*) (5) Moffett's juvenile record contained four entries, including assault with a deadly weapon. (*Ibid.*) (6) Moffett's "performance on probation was marginal at best." (*Ibid.*) And (7), Moffett's actions "were not those of an irresponsible child. They were the very adult, very violent acts of a young man . . . ." (RT 77.)

The court concluded, "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 discretion and sentencing him to a determinate term of twenty-five years to life." (RT 77.) Thus, there can be no doubt that the trial court 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.) Nor is this an instance where a flawed criminal procedure prevented the sentencing court from taking the defendant's youthfulness into account. (*Id.* at p. 2462.)

Miller stands for the proposition that trial courts must make individualized assessments of minors and their crimes before imposing LWOP. The Court of Appeal held that remand was necessary because "the court did not exercise its discretion under section 190.5, subdivision (b) with the benefit of the *Miller* opinion." (*Moffett*, *supra*, 148 Cal.Rptr.3d at

p. 55.) However, it is clear that the trial court considered all of the factors highlighted in *Miller* and it simply found that aggravating factors far outweighed mitigating ones.

For example, *Miller* noted that one flaw in mandatory penalties is that "every juvenile will receive the same sentence as every other—the 17–year–old and the 14-year-old . . . ." (*Miller*, *supra*, 132 S.Ct. at p. 2475.) However, California does not even authorize LWOP terms for anyone under 16 years of age. More importantly, *Miller* signaled that age not only matters when comparing children to adults, but also when comparing children's ages to each other. Thus, the trial court here properly used Moffett's proximity to adulthood as a reason to impose the LWOP sentence which, for an adult, would be the mandatory minimum. (See § 190.3, subd. (i) [listing age as a factor in determining the penalty for special circumstance murder]; see also § 190.5; *People v. Marquez* (1992) 1 Cal.4th 553, 582 & fn. 5; *Miller*, *supra*, 132 S.Ct. at p. 2463 [the punishment for a crime should be graduated and proportionate to both the offense and the defendant].)

Miller also noted that a mandatory LWOP sentence "neglects the circumstances of the homicide offense, including the extent of [the defendant's] participation in the conduct and the way familial and peer pressures may have affected him." (*Miller*, *supra*, 132 S.Ct. at p. 2468.) Here, however, the trial court took account of Moffett's active participation and use of a firearm. Indeed, it appeared that Moffett was the ring leader: he planned the crime, arranged for the stolen getaway car, and led the flight from police. Moffett certainly seemed more in charge than his accomplice who happened to be a few months past his eighteenth birthday. Thus, the codefendants' maturity and responsibility bore little relationship to whether the crimes were committed a short time before or after their eighteenth birthdays. And while Moffett was not the actual killer, he was arguably

more responsible for putting them in the situations that eventually led to Officer Lasater's death.

Lastly, respondent acknowledges that Moffett was not the actual killer, and there was no evidence that Moffett intended his codefendant to shoot or kill Officer Lasater. (But see RT 58 [prosecutor argued that Moffett harbored a conditional intent to kill when he put his gun up to the cashier's head and when he threatened to "cap" a bystander he thought might interfere with their escape].) *Miller* criticized the fact that mandatory sentences did not distinguish between actual killers and their accomplices. (*Miller*, *supra*, 132 S.Ct. at p. 2467.) Here, however, there is no question that the trial court knew that appellant was not the actual killer.[8] Indeed, it may have believed defense counsel's and the prosecutor's theory that appellant was not even present at the time of the murder. Thus, there can be no doubt that the trial court properly considered the fact that appellant did not harbor the intent to kill, but found the other factors in aggravation more compelling.

Therefore, because the sentencing court considered Moffett's age, stated there were no substantial mitigating circumstances, and found numerous factors in aggravation, it would have chosen the upper penalty even if there was no presumption. Accordingly, this Court should reinstate the LWOP sentence because no purpose would be served by asking the trial

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[8] Jackson was the other 14-year-old defendant considered in *Miller*. *Miller* noted, "Jackson did not fire the bullet that killed [the victim]; nor did the State argue that he intended her death. Jackson's conviction was instead based on an aiding-and-abetting theory. . . ." (*Miller*, *supra*, 132 S.Ct. at p. 2468.) The Court concluded that those "circumstances go to Jackson's culpability for the offense" and "[a]t the least, a sentencer should look at such facts before depriving a 14-year-old of any prospect of release from prison." (*Id.*, at pp. 2468–2469.) Thus, it is permissible to impose an LWOP term on a juvenile accomplice to murder provided the sentencer has considered the nature of the aider and abettor's involvement in the killing.

court to resentence Moffett for a third time. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *Stringer v. Black*, *supra*, 503 U.S. at p. 230.)

CONCLUSION

Accordingly, respondent requests that the judgment of the Court of Appeal be reversed.[9]

Dated: March 8, 2013

Respectfully submitted,

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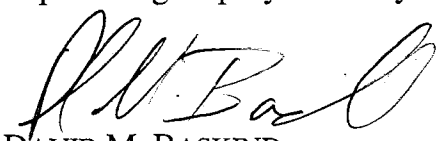

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[9] In addition, the trial court will need to correct the terms imposed for the robbery convictions in counts two, three, and four. (See *Moffett*, *supra*, 148 Cal.Rptr.3d at p. 57 [trial court incorrectly sentenced Moffett to the middle term of four years; the correct middle term sentence is three years].)

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF uses a 13 point Times New Roman font and contains 10,315 words.

Dated: March 8, 2013

KAMALA D. HARRIS
Attorney General of California

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Moffett** No.: **S206771**

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 March 8, 2013, I served the attached **RESPONDENT'S OPENING BRIEF** 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 March 8, 2013, at San Francisco, California.

E. Rios
Declarant

E. Rios
Signature

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