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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ANDREW 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 REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

INTRODUCTION

This Court granted respondent's petition for review to resolve one discrete question: Does Penal Code section 190.5, subdivision (b), violate the prohibition on mandatory life without parole ("LWOP") sentences for juveniles set forth in *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455] (*Miller*)?[1] As discussed in respondent's opening brief, the answer is no. California law does not violate the federal Constitution. *Miller* requires only that juveniles be permitted to present mitigating factors; that sentencing courts consider the nature of the crime and the youth of the offender; and that sentencing courts have the discretion to impose a lesser term. Section 190.5, subdivision (b), clearly meets all of those criteria.

Moffett spends only ten pages of his answering brief addressing the main issue before this Court. (Appellant's Answering Brief ("AAB") 19–29 [Argument I.C.].) He contends that section 190.5, subdivision (b), violates the federal Constitution because the LWOP presumption places an improper burden of production and persuasion on the juvenile defendant. According to Moffett, Supreme Court law teaches that the presumption should always be against imposing an LWOP term on juveniles. (AAB 28.) California's sentencing scheme, however, excludes the vast majority of juvenile murderers from even being eligible for an LWOP term. Nothing in *Miller* suggests that California cannot prefer LWOP for the small class of juveniles who commit the most egregious murders. Moreover, *Miller* requires only that juvenile murderers have an *opportunity* for a lesser term. And California requires sentencing courts to consider all relevant factors, including youth, in imposing a sentence. Therefore, since section 190.5, subdivision (b), gives sentencing courts the discretion to impose a lesser

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

term, it does not violate *Miller*'s ban on mandatory LWOP terms for juveniles.

Moffett's Arguments II, III, and IV are unmeritorious and only concern extraneous matters. (AAB 30–69.) In Argument II, Moffett argues that even if section 190.5, subdivision (b), is constitutional, this Court should remand for resentencing because *Miller* sets forth useful principles to guide the sentencing court. However, there was either error or there was not. As nothing in the sentencing here violated the rule of *Miller* or its principles, remand is inappropriate.

In Argument III, Moffett argues that this Court should remand for resentencing because the trial court's sentencing determination was affected by three mistakes of fact. However, the trial court's only substantive error was characterizing Moffett's prior assault adjudication as a felony rather than a misdemeanor. That mistake was surely harmless since the relevant aspect of the prior was the conduct—not whether it was denominated as a felony or misdemeanor. Indeed, it is likely that the crime had been designated as a misdemeanor solely to facilitate a plea agreement.

In Argument IV, Moffett contends that this Court should find that his LWOP sentence violates the proportionality tests of the Eighth Amendment and the California Constitution. That argument is plainly beyond the scope of the issue that this Court granted review on.

Finally, in Argument V, Moffett argues that the Court of Appeal did not reach alternative attacks on his LWOP sentence, including that it was cruel and unusual. However, that court implicitly rejected Moffett's proportionality argument by denying Moffett's request that it direct a sentence of 25 years to life. (Typed Opn. at p. 13.) Nevertheless, remand is appropriate so the Court of Appeal can fully consider all of the claims that it did not reach because it erroneously found *Miller* error.

In sum, California's sentencing scheme for juvenile murderers does not offend *Miller* and the trial court below properly imposed an LWOP term on Moffett. That sentence was appropriate because Moffett planned and orchestrated an extremely dangerous robbery of a crowded supermarket and bank. He wielded a fully loaded semiautomatic pistol. He held that gun up to the head of a cashier and later threatened to shoot a bystander. Either Moffett prodded codefendant Hamilton to flee from the police and then left him behind when Officer Lasater approached or else Hamilton shot Lasater to prevent him from arresting Moffett. Either way, Moffett shared responsibility for the officer's death. Moreover, to the extent Hamilton was the actual killer and a few months older than Moffett, Hamilton received a proportionately greater sentence—death. Accordingly, Moffett was properly sentenced to an appropriate term and there is no need for the trial court to determine Moffett's murder sentence for a third time.

ARGUMENT

I. THE LWOP PRESUMPTION DOES NOT VIOLATE *MILLER*

Miller held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments'" because it does not allow sentencing courts to make individualized sentencing determinations for those facing the most serious punishment. (*Miller*, *supra*, 132 S.Ct. at p. 2460.) The most serious punishment for juveniles convicted of murder is life without the possibility of parole (LWOP). (*Roper v. Simmons* (2005) 543 U.S. 551, 578 (*Roper*) [death penalty unconstitutional for juveniles]; *Graham v. Florida* (2010) 560 U.S. 48 [130 S.Ct. 2011, 2034] (*Graham*) [LWOP unconstitutional for juveniles convicted of nonhomicide offenses].)

Section 190.5, subdivision (b), makes LWOP the presumptive term for a sixteen- or seventeen-year-old convicted of special circumstance

murder. (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089 (*Ybarra*); *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1145 (*Guinn*).) But it is not mandatory because it also gives trial courts the discretion to impose a term of 25 years to life. Nothing in that statute prevents a sentencing court from making an individualized sentencing determination. And other provisions of California law *require* sentencing courts to do exactly that. Therefore, section 190.5, subdivision (b), offends neither *Miller*'s requirement that courts make individualized sentencing decisions before imposing the most severe punishments, nor its prohibition on mandatory LWOP terms for minors.

Moreover, California law is distinguishable from the laws struck down in *Miller* in *every* relevant way. For example, the *Miller* opinion begins: "[1] The two 14–year–old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. [2] In neither case did the sentencing authority have any discretion to impose a different punishment. [3] State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate." (*Miller*, *supra*, 132 S.Ct. at p. 2460.)

First, in contrast with the state laws considered in *Miller*, 14-year-olds are not eligible for LWOP terms in California. (§ 190.5.) Second, unlike the laws in *Miller*, California sentencing courts *do* have the discretion to impose a lesser sentence. (Compare *Miller*, *supra*, 132 S.Ct. at p. 2461 ["Noting that 'in view of [the] verdict, there's only one possible punishment,' the judge sentenced Jackson to life without parole."] with § 190.5, subd. (b) [trial court has discretion to sentence juvenile to life with parole].) And third, unlike the laws in *Miller*, California law requires sentencing courts to consider mitigating factors such as youth. (§ 190.3,

subd. (i); Cal. Rules of Court, rule 4.423; *Ybarra*, *supra*, 166 Cal.App.4th at p. 1092; *People v. Guinn*, *supra*, 28 Cal.App.4th at pp. 1142–1143.) It also requires the sentencing court to impose a life term with the possibility of parole when that lesser sentence is more appropriate. (See *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 978.) Thus, California law clearly differs on every relevant ground from the Arkansas and Alabama laws considered in *Miller*.

Moffett contends that the LWOP presumption is inconsistent with the rationale underlying *Miller*. (AAB 13, 20.) According to Moffett, *Miller* requires courts to approach the imposition of LWOP terms on juveniles with "general penological doubt." (AAB 20.) Moffett is correct that *Miller* advised that LWOP should be imposed on juveniles sparingly. However, that does not compel a rule in which there is a presumption against imposing LWOP on juveniles at every decision point. *Miller* requires only that the sentencing court have an "opportunity" to consider various mitigating factors (including youth) as well as the power to impose a lesser punishment when appropriate. (*Miller*, *supra*, 132 S.Ct. at p. 2475.) Even though California has an LWOP preference for juvenile special circumstance murderers, it still requires sentencing courts to consider mitigating factors and it gives those courts the authority to impose the lesser term of 25 years to life. Therefore, section 190.5, subdivision (b), complies with *Miller*'s fundamental requirements.

Further, several aspects of California law ensure that few juvenile defendants will ever reach the point where they will be subject to an LWOP term. First and foremost, *Miller* left open the possibility that the two fourteen-year-olds considered there could still be sentenced to LWOP. (*Miller*, *supra*, 132 S.Ct. at p. 2455.) California, on the other hand, does not permit LWOP terms for anyone under sixteen years old. Thus, the defendants in *Miller* would be better off being sentenced in California than

in a jurisdiction that had no LWOP presumption—but extended that punishment to fourteen-year-olds or younger. In other words, California significantly narrows the class of juvenile murderers who are eligible for LWOP before a sentencing court even considers the matter.

Similarly, *Miller* does nothing to prohibit the discretionary imposition of LWOP terms on juveniles convicted of murder. Presumably, California could therefore impose LWOP terms on juveniles convicted of even second degree murder. However, California does not provide for LWOP terms for juveniles convicted of that crime. It is only when a sixteen- or seventeen-year-old juvenile commits first degree *special circumstance* murder that he or she even becomes eligible for an LWOP term. At that point, California does provide a presumption in favor of that term. But nothing in *Miller* precludes such a system. Indeed, California's sentencing scheme is much more favorable to juvenile defendants who are statutorily excluded from receiving LWOP than juveniles in other jurisdictions who are eligible for LWOP—but have a more favorable burden of proof.

Taken to its logical extreme, Moffett's rule would prevent a state from preferring LWOP no matter how many people a juvenile killed. But, of course, making such choices is exactly what states always do when they set degrees of crimes and concomitant punishment. (See *Boyde v. California* (1990) 494 U.S. 370, 377 ["there is no . . . constitutional requirement of unfettered sentencing discretion in the [trier of fact], and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'"].) Therefore, if the goal is to make LWOP rare for minors, the most effective way to accomplish that is to statutorily limit its applicability.

In short, *Miller*'s goal is to make LWOP terms for minors rare, but that does not dictate a particular burden of proof. Rather, the *Miller* Court relies on the natural consequence of requiring sentencing courts to make

individualized determinations based on all relevant considerations, including those attendant to youth. (*Miller*, *supra*, 132 S.Ct. at p. 2471, fn. 10 ["when given the choice, sentencers impose life without parole on children relatively rarely."].) California's sentencing scheme categorically excludes a large portion of juvenile murderers—based on both the age of the minor as well as the nature of the crime. It then affords the trial courts broad discretion to consider all relevant considerations, including youth, in determining whether defendants who are not categorically excluded from LWOP should actually receive that sentence. In this manner, California fulfills the spirit as well as the letter of *Miller*.

A capital case that the *Miller* Court relied on, *Johnson v. Texas* (1993) 509 U.S. 350, supports the proposition that under the Eighth Amendment, it is enough that a defendant's youth be available for the sentencer's consideration. In *Johnson*, the jury found the defendant guilty of capital murder and the trial court held a penalty trial. (*Id.* at p. 354.) The jury was asked whether the defendant committed the murder deliberately, and whether it was probable that he would constitute a continuing threat to society. The jury was also told that if the jury answered both questions affirmatively, the court would impose the death penalty. (*Ibid.*) The jury answered affirmatively and the defendant appealed. (*Id.* at p. 358.) On appeal, "petitioner contend[ed] that the Texas sentencing system did not allow the jury to give adequate mitigating effect to the evidence of his youth." (*Id.* at p. 366.) The court concluded that "there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of petitioner's youth." (*Id.* at p. 368.)

Thus, in *Johnson*, the Court found no constitutional error because the jury could have considered the defendant's youth—even though it was never instructed that it could or should do so. And similarly, in its reliance on the principles of adult capital sentencing, *Miller* requires only that the

juvenile "sentencer have the *ability* to consider the 'mitigating qualities of youth.'" (See *Miller*, *supra*, 132 S.Ct. at pp. 2467–2468, italics added; AAB 23–24.) California's system is therefore constitutional because it permits the sentencing court to consider the defendant's youth and gives the court the power to impose a lesser term.

Moffett argues that respondent has missed the point of *Miller* because California law does not require sentencing courts to consider the "distinctive *Roper/Graham/Miller* mitigating developmental principles for juveniles . . . ." (AAB 26.) To the extent Moffett is suggesting that *Miller requires* sentencing courts to tick off a list of possible mitigating factors attendant to youth before it can impose an LWOP term, he is turning the rule on its head. The state does not have to prove that the sentencing court considered every possible mitigating factor; the defendant must prove that the sentencing court was precluded by law—or refused to consider—his relevant mitigating evidence. (*Miller*, *supra*, 132 S.Ct. at p. 2475; see *Johnson v. Texas*, *supra*, 509 U.S. at p. 367.) Thus, the question here is not whether the trial court gave adequate consideration to Moffett's youth; it is whether the trial court was foreclosed from considering his youth. Clearly, it was not.

Moreover, as discussed in respondent's opening brief, California law required the sentencing court to consider Moffett's youth. (§ 190.3; Cal. Rules of Court, rule 4.423; *People v. Superior Court* (*Alvarez*), *supra*, 14 Cal.4th at p. 978.) And contrary to Moffett's argument, the trial court did not merely mention Moffett's age. It categorically stated, "The actions taken by Mr. Moffett on the day of this event were not those of an irresponsible child. They were the very adult, very violent acts of a young man . . . ." (RT 77.) Thus, there can be no doubt that the trial court gave Moffett's youth due consideration and simply found that his age did not explain or excuse his conduct.

Finally in its opening brief, respondent noted several times that *Miller* expressly cited section 190.5, subdivision (b), as an example of a constitutional non-mandatory sentencing scheme. Though Moffett never acknowledges or directly addresses that fact, in a slightly different context he does concede that Supreme Court dicta "is entitled to considerable deference." (AAB 28, fn. 7.) That is certainly the case here. Not only did *Miller* specifically indicate that section 190.5, subdivision (b), was constitutional, that statute satisfies the express requirements set forth in *Miller*. Respondent submits, therefore, that when the Supreme Court speaks that plainly, this Court should not parse the Supreme Court's opinion for a hidden meaning that supports an opposite result.

II. THERE IS NO NEED FOR RESENTENCING ON THE MURDER COUNT BECAUSE THE LWOP PRESUMPTION IS CONSTITUTIONAL AND THE TRIAL COURT COMPLIED WITH *MILLER*'S SENTENCING GUIDELINES

Moffett argues that even if section 190.5, subdivision (b), is constitutional, *Miller* requires that this Court remand the matter so the trial court can resentence him with the benefit of *Miller*'s sentencing guidance. (AAB 26–27, 30.) Not so. *Miller* does, of course, give relevant guidance on standards to be applied when courts consider whether to impose LWOP on a minor. However, remand for resentencing is required only when the trial court erred. As discussed above—and as Moffett concedes for purposes of this argument (AAB 30)—California's sentencing scheme for special circumstance juvenile murderers is constitutional. Therefore, there was no *Miller* error and no reason for remand.

In summarizing its analysis, *Miller* noted that mandatory LWOP terms for juveniles were unconstitutional because they did not allow sentencing courts to consider: (1) a defendant's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences" (*Miller*, *supra*, 132 S.Ct. at p. 2468);

(2) "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional" (*ibid.*); (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him" (*ibid.*); and (4) "that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys" (*ibid.*).

Moffett seems to argue that *Miller* established new sentencing guidelines that were previously unknown and unavailable to sentencing courts. However, *Miller* repeatedly declares that its repudiation of *mandatory* LWOP terms for juveniles naturally arose out of its earlier sentencing jurisprudence—particularly *Roper* and *Graham*. (*Miller*, *supra*, 132 S.Ct. at pp. 2461–2462, 2463–2468; see *People v. Caballero* (2012) 55 Cal.4th 262, 267 ["In *Miller*, the United States Supreme Court extended *Graham's* reasoning . . . ."].) "While *Graham's* flat ban on life without parole was for nonhomicide crimes, nothing that *Graham* said about children is crime-specific. Thus, its reasoning implicates any life-without-parole sentence for a juvenile, even as its categorical bar relates only to nonhomicide offenses. Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." (*Miller*, at p. 2458.)

Furthermore, *Miller* explained, "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." (*Miller*, *supra*, 132 S.Ct. at p. 2465.) Thus, Moffett's suggestion that the trial court could not have been aware of these considerations without the benefit of *Miller* is incorrect. (See *id.* at p. 2464

["Our decisions rested not only on common sense—on what 'any parent knows'—but on science and social science as well."].)

Moreover, contrary to Moffett's argument that *Miller* created new and unforeseen factors that must be considered on remand, this Court explained the relevance of factors relating to youth thirty years ago. In *People v. Dillon*—which Moffett cites repeatedly—this Court stated that a proportionate sentence for youthful offenders should include a consideration of such factors as age, prior criminality, personal characteristics, and character. (*People v. Dillon* (1983) 34 Cal.3d 441, 479–482.)

Most importantly, Moffett did not face a mandatory sentencing scheme. And the trial court had the opportunity to consider the attributes attendant to youth discussed in *Graham*, *Roper*, and *Dillon*. Thus, there was no error and there is no reason to remand. "'The test for determining what action should be taken remains the same: was there prejudicial error in the proceedings? When, as in this case, the trial court is vested with discretion to determine the punishment . . . and there has been no error, this court has no power to substitute its judgment for that of the trial court.'" (*People v. Navarro* (2007) 40 Cal.4th 668, 678, quoting *People v. Odle* (1951) 37 Cal.2d 52, 58–59; see *People v. Alvarado* (2001) 87 Cal.App.4th 178, 195, fn. 5 [remand necessary only if defendant can demonstrate that trial court misunderstood its sentencing discretion].)

Furthermore, to the extent Moffett has an equitable claim in seeking resentencing, it bears repeating that *Miller* requires only the *opportunity* to present mitigating circumstances relating to youth, not a checklist for the trial court to mechanically put on the record. The trial court below was not under a misapprehension that it could not exercise its discretion under section 190.5. It never expressed a belief that it could not consider Moffett's upbringing, mental and emotional development, impetuosity,

ability to appreciate risks and consequences, or his potential for rehabilitation. Nor is there any indication that the trial court excluded any proffered evidence of Moffett's character, background, history, mental condition, or physical condition.

On the contrary, the trial court considered everything Moffett presented—as it was required to do. (See *Guinn*, *supra*, 28 Cal.App.4th at pp. 1141–1143; *Ybarra*, *supra*, 166 Cal.App.4th at p. 1089; see Cal. Rules of Court, rule 4.423; § 190.3.) Moffett filed a sentencing memorandum requesting imposition of the lesser term of 25 years to life. (CT 62–81.) Moffett also filed a reply to the prosecution's opposition to reducing the term from LWOP to 25 years to life. (CT 96–103.) In his sentencing memorandum, Moffett made extensive arguments about why his youth made the lower term more appropriate. (CT 66–76.) Moffett argued: "[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . ." (CT 66.) "[J]uveniles have less control, or less experience with control, over their own environment." (CT 67.) "Mr. Moffett's age at the time he committed the crimes is highly relevant to the analysis of the court imposing twenty five years to life." (*Ibid.*) "'[P]arts 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.'" (CT 68, quoting *Graham*, *supra*, 130 S.Ct. at pp. 2026–2027.) The young have "diminished culpability." (CT 69.) "[I]t is requested that the court in fashioning a sentence . . . set forth a punishment scaled to the age of Mr. Moffett." (CT 80.) "In many cases, juvenile crimes are related to the impulsive and immature nature of youth . . . . [¶] Accordingly, it is requested that this court not impose life without parole . . . ." (CT 81.)

The trial court stated at the sentencing hearing that it had read the sentencing briefs. (RT 42.) The trial court allowed Moffett to make an unsworn statement in mitigation even though he had no right to do so. (RT 54–55; see *People v. Evans* (2008) 44 Cal.4th 590, 600.) And defense counsel made an extensive argument regarding why Moffett should receive the lower sentence. (RT 62–73.) For example, counsel argued: "[W]e know that Andrew was a minor at the time it happened. We know . . . Andrew did not pull the trigger." (RT 67.) Moffett did not have the "specific intent to kill the officer." (*Ibid.*) "[A]ge is the line we use." (RT 68.) "[Y]outh is more than a chronological fact. It is [a] time and condition of life when a person may be more susceptible to influence and to psychological damage." (*Ibid.*) "I would argue to this Court that compared to the adult murder, a juvenile who did not intend to kill has a twice diminished culpability." (*Ibid.*)

After considering Moffett's arguments, the trial court noted that 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." (*Ibid.*) Thus, the trial court considered Moffett's arguments; it simply concluded that Moffett's age and other circumstances did not excuse his behavior.

In sum, the trial court had the opportunity to consider numerous circumstances in mitigation prior to sentencing. More specifically, it heard various arguments about why Moffett's youth made a sentence of 25 years to life more appropriate. Accordingly, there can be no doubt that the sentencing hearing complied with the requirements of *Miller*. (*Miller*, *supra*, 132 S.Ct. at p. 2475.)

Moffett's argument to the contrary begs the question of what exactly this Court would remand for. Moffett already argued he should have the possibility of parole because he was not the actual killer; he was a minor; he was immature; and he was capable of change. Certainly, if the exact same hearing were held today—with a nod to *Miller*—Moffett would have no basis for relief. (See *Miller*, *supra*, 132 S.Ct. at p. 2468.)

Nevertheless, Moffett insists that respondent focuses too much on *Miller*'s proscription of mandatory LWOP terms and fails to recognize the importance of *Miller*'s sentencing guidance. According to Moffett, respondent argues that "*everything* else *Miller* says beyond proscribing mandatory LWOP is mere dicta." (AAB 26.) That is not the case. Respondent acknowledges the value of *Miller*'s sentencing advice. And if a sentencing court refuses to consider "*Miller* evidence," that would be error. But here the sentencing court heard *everything* that Moffett wanted to say. And every indication is that the court understood it could use that evidence to impose the lesser term. Therefore, Moffett's claim that the trial court needed *Miller*'s sentencing guidance makes little sense.

Moffett relies on three state cases to support his claim that remand is necessary in all instances when a court sentenced a juvenile to LWOP without first considering *Miller*. (AAB 30–31.) The first of these cases, *Daugherty v. State* (Fla. Dist. Ct. App. 2012) 96 So.3d 1076 [2012 WL 6116103], remanded so the trial court could "conduct further sentencing proceedings and expressly consider whether any of the numerous 'distinctive attributes of youth' referenced in *Miller* apply in this case . . . ." (*Id.* at p. 1080.) However, *Daugherty* never expressly found *Miller* error, nor did it suggest that *Miller* required remand. The remand appears to have been no more than an exercise of the court's discretionary power. In any case, an opinion by Florida's lower appellate court—which lacked any relevant analysis—is far from persuasive.

Moffett also claims that *Sen v. State* (Wyo. 2013) 301 P.3d 106 [2013 WL 1749531] stands for the proposition that it is insufficient if a sentencing court considered some factors relating to youth if it did not have the benefit of *Miller*'s guidance. (AAB 31.) However, *Sen* held that remand was necessary because Wyoming's sentencing scheme was mandatory, i.e., there was *Miller* error. (2013 WL 1749531 at pp. 15–18.) Under that circumstance, any "opportunity" to present mitigating evidence was a hollow procedure. In contrast, California trial courts are empowered (indeed, required) to hear and act on mitigating evidence when considering LWOP for juveniles.

Finally, Moffett cites *Jackson v. Norris* (2013) 2013 Ark. 175 (after remand by the Supreme Court) for the proposition that *Miller* error cannot be fixed by an appellate court. (AAB 31.) However, that case is inapplicable to Moffett. Since there was no *Miller* error here, remand is unnecessary.

In sum, none of the reasons given by Moffett justify remand. As Moffett acknowledges, "after a lengthy trial and two sentencing hearings, there are no remaining material or supportable conflicts of historical fact warranting remand or deference here . . . . [R]emand for further litigation is not appropriate here . . . ." (AAB 45; see also AAB 55 ["Remand for further factfinding is not necessary on these facts . . . ."].)

III. THE TRIAL COURT'S MISTAKEN REFERENCE TO MOFFETT'S PRIOR ASSAULT AS A FELONY WAS HARMLESS

Moffett contends that this Court should remand for resentencing because (1) the trial court failed to consider that he was a juvenile and not the actual killer, i.e., he had "twice-diminished culpability"; (2) the trial court placed too much emphasis on the trauma suffered by a victim; and (3) the trial court mistakenly thought that Moffett had a prior adjudication for felony assault with a deadly weapon, but the assault was actually a

misdemeanor. (AAB 34–35.) Only the first of these three assertions concerns *Miller*. The second and third simply involve an alleged abuse of sentencing discretion, not an alleged failure to consider factors mandated by *Miller*. Moreover, the sentencing court was aware of Moffett's "twice-diminished culpability"; it acted well within its discretion to weigh the effects of Moffett's threatening behavior; and the trial court's misstatement about the nature of the prior assault adjudication was harmless.

A. The Trial Court Considered Moffett's "Twice-Diminished Culpability"

Moffett contends that he should be resentenced so the trial court can properly consider the fact of his "twice diminished culpability," i.e., that he was a juvenile and not the actual killer. (AAB 34.) However, defense counsel made that point in his sentencing memorandum (CT 68), and the trial court noted both facts at the sentencing hearing (RT 76–77). Moreover, the prosecution never suggested that Moffett was the actual killer. And respondent conceded in the first appeal that there was no evidence that Moffett harbored the intent to kill Officer Lasater.

Furthermore, the trial court reasonably determined that Moffett was the person most responsible for creating the dangerous situation that led to Officer Lasater's death. The trial court explained that Moffett "very actively participated in a series of events, starting with the theft of the car . . .; the takeover style robbery of the Raley's store and the bank window; the wild drive and crash in a nearby neighborhood; the confrontation of a resident where Mr. Moffett told him, 'Stop or I'll cap you'; and the shooting of Officer Lasater . . . ." (RT 76.)

It is also worth noting that in *Miller*, defendant Jackson was also not the actual killer and there was no evidence that he intended to kill. (*Miller*, *supra*, 132 S.Ct. at pp. 2461, 2468.) Nevertheless, *Miller* expressly held that if the proper procedures were followed, the lower court could again

sentence Jackson to LWOP. (*Id.* at p. 2469 ["we do not foreclose a sentencer's ability to make that judgment"]; see also *id.* at p. 2471; but see *id.* at p. 2475 (concurring opinion of Breyer, J.).) If Arkansas could still impose an LWOP term on Jackson, it is meritless to suggest that "the spirit of *Miller*" precludes California from doing the same to Moffett. After all, Jackson was much younger than Moffett. Jackson was unarmed, but Moffett carried a fully loaded semiautomatic weapon and used it to threaten two people. And Jackson only joined the crime (perhaps unwittingly) at the last second, while Moffett planned and orchestrated the armed robberies.

Moffett argues that court-appointed psychologist Larry Wornian ultimately determined that Moffett was competent to stand trial, but not before finding that he was a "profoundly immature adult." (AAB 15, 32, citing 17 CT 4520.) Moffett neglects to mention, however, that Dr. Wornian retracted his initial evaluation and determination of incompetence. (34RT 7399.) Wornian concluded that he had been fooled with "deceit and manipulation" and that Moffett was "**eminently** competent." (17CT 4574, boldface in original; see also 17CT 4562, 4566 [Dr. Paul Good found that two of three tests for malingering and additional competency tests showed that Moffett was intentionally withholding his best efforts].)

Needless to say, evidence that Moffett malingered and initially fooled an experienced psychiatrist demonstrated his cleverness and criminal sophistication. (See also 17CT 4567–4568 [Dr. Paul Good's report listed seven observations which showed that Moffett was mature and sophisticated in his interactions with the police and legal system.].) Thus, contrary to Moffett's argument, there was not "evidence of profound immaturity here . . . ." (AAB 33.) The evidence supported the trial court's determination that Moffett had the cunning of a depraved adult.

Moffett repeatedly asserts that respondent "insist[ed] the relevance of appellant's age at just under 18 was 'virtually nil' (RAOB 20) . . . ." (AAB

33, 41, 54–55.) On the contrary, respondent argued that Moffett's age was probative. That is why Moffett's proximity to his eighteenth birthday was so important.

In fact, *Miller* itself supports the relevant distinction at sentencing between 17-year-olds and 14-year-olds. In *Miller*, the court reiterated its observation from *Graham*, *supra*, 130 S.Ct. at page 2026, "that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.'" (*Miller*, *supra*, 132 S.Ct. at p. at p. 2464.) It is implicit that brain development occurs on a somewhat linear basis. Children do not have poor behavior control when they are seventeen and then suddenly acquire the peak of their control on their eighteenth birthday. Undoubtedly, most people continue to develop their ability to control their behavior and gain the ability to foresee negative consequences throughout their lives. But in the realm of juvenile law, the day before a minor's eighteenth birthday is the maximum relevant age. Thus, within that closed universe, it is presumed that someone approaching his eighteenth birthday is the most mature. (See *Johnson v. Texas*, *supra*, 509 U.S. at p. 368 ["The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."].) That fact supported the trial court's determination that Moffett's actions "were the very adult, very violent acts of a young man . . . ." (RT 77.)

Indeed, *Miller* noted that a significant flaw in mandatory sentencing schemes was that they failed to distinguish between fourteen-year-old and seventeen-year-old murderers. "Our holding requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes." (*Miller*, *supra*, 132 S.Ct. at p. 2469, fn. 8.)

Accordingly, Moffett's age was quite relevant: The fact that he was days shy of majority tended to prove that he was more mature and responsible than a child several years younger.

Finally, *Miller* observed that juveniles deserved individualized sentencing consideration because they had a "heightened capacity for change" and courts had "great difficulty . . . 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, quoting *Roper*, 543 U.S. at p. 573 and *Graham*, *supra*, 130 S.Ct. at p. 2026–2027.) Here, however, Moffett's proximity to his eighteenth birthday meant there was the least chance that his behavior reflected transient immaturity. Indeed, the trial court implicitly found that Moffett was in the class of juveniles who were irreparably corrupt. After noting that Moffett had spent time in a juvenile facility and had done poorly on probation, the trial court stated, "The juvenile justice system has infinitely more resources than the adult system. And it appears those resources were not sufficiently taken advantage of to choose a different path." (RT 76–77.) In other words, the trial court believed that Moffett would not change.

In sum, there can be no doubt that the trial court had the opportunity to consider—and did consider—Moffett's nominally "twice-diminished culpability." It simply concluded that Moffett's age neither excused his actions nor afforded any hope that he would change his ways. Thus, there was no *Miller* error. Moreover, even if the trial court fell short in form or substance, it is clear from its sentencing statements that any error was harmless beyond a reasonable doubt. (See *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 [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].)

B. The Trial Court Properly Considered How Moffett's Conduct Impacted His Victim

The evidence showed that Moffett went up to Raley's cashier Rima Bosso and said, "'Give me the money.'" When she paused, Moffett said, "'Bitch, I said give me the money.'" Bosso panicked and could not open the register. Moffett put his gun up against her left ear, pushed her head with it, and repeated, "'Give me the money.'" He also commanded, "'Open the drawer, bitch. Open the drawer.'" But Bosso could not figure out why the drawer would not open. 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.) Bosso finally figured out what was not working, opened the drawer, and gave Moffett $800. Then Bosso closed her eyes because she thought Moffett would shoot and kill her. When she opened her eyes and saw that Moffett had run away, Bosso fell to the floor and cried hysterically. (22RT 5168–5175; 23RT 5337.)

The trial court noted at the first sentencing hearing that Bosso had indicated she lived in fear; she kept the curtains pulled and the doors locked at all times. Moreover, the incident had "changed her life profoundly." (34RT 7761–7762; see 22RT 5037, 5168–5175; 23RT 5337.) At the second sentencing hearing, the trial court reiterated that Bosso was fearful night and day and the event "changed her life profoundly and forever." (RT 75.)

Moffett contends that he had a "lack of intent to harm anyone" and the trial court erred by placing heavy reliance on the trauma suffered by cashier Rima Bosso. (AAB 34–35, 38.) Moffett's protestation of blamelessness

rings hollow. Indeed, his mental-state excuse underscores the relevance of the victim impact evidence that Bosso was harmed.

In any case, Moffett forfeited this claim. The trial court stated that it "ha[d] discretion regarding sentencing." (RT 75.) The first aggravating factor it discussed was how Moffett's conduct profoundly affected Bosso. (*Ibid.*) But Moffett did not object. (RT 75–78.) Therefore, he has forfeited this claim on appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 354 ["claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner."].)

Moreover, there is no merit to Moffett's claim. This Court has affirmed the relevance and constitutionality of victim impact evidence at capital sentencing. (*People v. Lewis* (2006) 39 Cal.4th 970, 1066.) As discussed above and propounded by Moffett, the sentencing considerations (although not the procedures) that apply to adult capital defendants generally apply to juvenile defendants facing LWOP. (See *Miller*, *supra*, 132 S.Ct. at p. 2467 [juvenile life sentences are analogized to capital punishment].) Therefore, just as victim impact evidence is admissible in capital penalty trials (*People v. Brady* (2010) 50 Cal.4th 547, 574), it should be admissible in LWOP sentencing hearings for juveniles. Accordingly, Moffett has no basis to claim it was improper or prejudicial. (See *People v. Lewis*, at p. 1066.)

Moreover, any error in "over-emphasizing" the victim impact evidence was harmless. The trial court's reference to Bosso's ongoing trauma was certainly not extensive or overly-emotional. Thus, there is no reasonable probability that Moffett would have received a more favorable sentence absent the alleged error. (See *People v. Watson* (1956) 46 Cal.2d 818, 837; *People v. Nelson* (2011) 51 Cal.4th 198, 224 [use of improper aggravating factor in sentencing is subject to state test for harmlessness].)

C. The Trial Court Mistakenly Described Moffett's Prior Assault As a Felony, But It Was Harmless

Moffett's probation report indicated that Moffett pleaded no contest to a misdemeanor count of assault with a deadly weapon or force likely to produce great bodily injury. (17CT 4692; § 245, subd. (a)(1)). That court imposed a six-month wardship at the Orin Allen Youth Rehabilitation Facility (OAYRF) Boy's Ranch in Byron, Contra Costa County. (17CT 4692.) At Moffett's sentencing on the current matter, the trial court stated, "I've also considered Mr. Moffett's juvenile criminal history. There were four entries, including a felony, 245(a)(1) Penal Code, assault with a deadly weapon." (RT 76.) Thus, the trial court mistakenly referred to the misdemeanor adjudication as a felony.

Moffett contends that the mistake influenced the trial court's decision to impose the LWOP term. (AAB 16, 34.) However, Moffett forfeited his claim of error by failing to object. (RT 76; see *People v. Scott*, *supra*, 9 Cal.4th at p. 354 [forfeiture doctrine applies to "factually flawed" sentencing errors].)

Moreover, the mistake was inconsequential because the relevant fact was the underlying conduct, not whether the crime was denominated a felony or misdemeanor. Assault with a deadly weapon or force likely to produce great bodily injury can be charged as a felony or misdemeanor. (§ 245, subd. (a)(1)). An offense that is punishable either as a felony or as a misdemeanor is commonly called a "wobbler." The prosecutor has the discretion to decide whether to charge a wobbler as a misdemeanor or felony. (§ 17, subd. (b); *People v. Statum* (2002) 28 Cal.4th 682, 689.)

The elements of a violation of section 245, subdivision (a)(1), are the same regardless of whether the crime is charged as a misdemeanor or felony. Therefore, the prosecutor not only had broad discretion to decide whether to charge Moffett with a misdemeanor or felony (see *People v.*

Statum, *supra*, 28 Cal.4th at p. 689), but also whether to make a plea agreement. Since Moffett pleaded no contest, it is likely that the prosecutor agreed to the misdemeanor term to facilitate the plea. In any case, whether the crime was punished as a felony or misdemeanor was irrelevant to the nature of Moffett's history of criminal activity. Further, the nature of the offense, i.e., "shot 18 yr. old male victim w/CO2 powered B-B pistol—victim struck 4 times" (17CT 4692), communicated the nature of Moffett's conduct more accurately than its characterization as a felony or misdemeanor.

Finally, the trial court's mistake in referring to the assault as a felony was counterbalanced by two additional minor mistakes. First, the trial court stated that Moffett had four juvenile violations. (34RT 7762.) He actually had five.[2] (17CT 4692.) The trial court also mistakenly thought that "Moffett was under 18 by a few months at the time of this incident . . . ." In fact, he was just four days shy of his eighteenth birthday. (17CT 4691 [Moffett's date of birth was April 27, 1987]; 22RT 5006 [crimes took place on April 23, 2005].) In sum, all of these mistakes were relatively minor.

Given the trial court's statements about the appropriateness of the LWOP sentence, any error in describing the prior assault as a felony was

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[2] The probation report lists five violations: (1) possession of marijuana for sale; (2) assault with a deadly weapon or force likely to produce great bodily injury; (3) fighting with another ward; (4) testing positive for cocaine; and (5) possession of crack for sale. (17CT 4692.) The probation report also indicates that Moffett never obtained a driver's license because he caused an accident when he was sixteen years old. (17CT 4691.) That means Moffett drove the stolen car to the crime scene without a license. (23RT 5362; 27RT 5767; see Health & Saf. Code, § 40000.11, subd. (b).) Moffett demonstrates his lack of appreciation for the seriousness of his violations by arguing they constitute nothing more than the typical record "of a teenager." (AAB 38.)

harmless. There is no reasonable probability that Moffett would have received a more favorable sentence absent the alleged error. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 837; *People v. Osband* (1996) 13 Cal.4th 622, 728 [improper use of fact to impose upper term reviewed under state harmlessness test]; see *People v. Whitt* (1990) 51 Cal.3d 620, 660 ["The judge placed primary aggravating weight on the callous nature of the crimes and defendant's prior conviction . . . . [Therefore, a]ny mischaracterization of factors was therefore harmless under any standard."].)[3]

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[3] At sentencing, the trial court stated, "I will note that although we don't know exactly where Mr. Moffett was when Mr. Hamilton shot Officer Lasater, the police found gun residue on Mr. Moffett's hands, meaning that even if he did not fire the weapon, he was close to it when it was fired; shoe prints matching Mr. Moffett's [were] ten feet away from where Officer Lasater fell; and Mr. Moffett's cell phone [was found] a few feet away from Officer Lasater." (RT 76.) Moffett argued at the Court of Appeal that the trial court was mistaken about the significance of the gunshot residue (GSR). (A133032 AOB 55.) Indeed, the parties stipulated that Moffett could have acquired the GSR solely from handling his own gun. (29RT 6691.)

Here, however, Moffett makes only passing reference to this claim. (AAB 11–12 & fn. 4, 45.) To the extent Moffett relies on that reason as a further mistake of fact that justifies remand, the claim is forfeited for failure to object. (See *People v. Scott*, *supra*, 9 Cal.4th at p. 354.) Moreover, any error was harmless because the evidence did suggest that Moffett was near Hamilton and Officer Lasater when the officer was shot. (See A133032 RB 12–18.) Further, the trial court acknowledged that it did not "know exactly where Mr. Moffett was . . . ." (RT 76.) Therefore, it is not reasonably probable that the trial court would have imposed a lesser term if it had not relied on the GSR as evidence that Moffett was near Hamilton when Officer Lasater was shot. (See *People v. Osband*, *supra*, 13 Cal.4th at p. 728.)

IV. MOFFETT'S FACIAL CHALLENGE TO THE CONSTITUTIONALITY OF LWOP TERMS FOR JUVENILE MURDERERS IS NOT WITHIN THE SCOPE OF THE ISSUE ON REVIEW

Miller expressly declined to decide whether it violates the Eighth Amendment to impose LWOP on juveniles convicted of a homicide. (*Miller*, *supra*, 132 S.Ct. at p. 2469.) It also declined to "foreclose a sentencer's ability to" impose LWOP on such juveniles defendants. (*Ibid.*) Nevertheless, Moffett contends that his LWOP term categorically violates article 1, section 17 of the California Constitution as well as the Eighth Amendment. (AAB 42.) This Court should reject the claim as beyond the scope of the issue on review. (See *People v. Perez* (2005) 35 Cal.4th 1219, 1228 [the court "may consider all issues fairly embraced in the petition."]; Cal. Rules of Court, rule 8.520(b)(3) ["Unless the court orders otherwise, briefs on the merits must be limited to the issues stated in [the statement of issues in the petition for review and answer] and any issues fairly included in them."].[4])

This Court granted respondent's petition for review on only one issue: whether Penal Code section 190.5, subdivision (b), violates the prohibition on mandatory terms of life without parole for minors set forth in *Miller*. Consideration of the separate issue of the constitutionality of a facial Eighth Amendment challenge would be inappropriate, particularly in light of the fact that *Miller* specifically refused to rule on the facial constitutionality of juvenile LWOP terms. Accordingly, this Court should decline to address

[4] Moffett did not file an answer to the petition for review.

Moffett's additional claim on the merits.[5] (See *People v. Perez*, *supra*, 35 Cal.4th at p. 1228; Cal. Rules of Court, rule 8.520(b)(3).)

V. REMAND TO THE COURT OF APPEAL IS APPROPRIATE SO IT CAN CONSIDER WHETHER THE TRIAL COURT ABUSED ITS SENTENCING DISCRETION, VIOLATED MOFFETT'S RIGHT TO EQUAL PROTECTION, OR IMPOSED A CRUEL AND UNUSUAL PUNISHMENT

Moffett argues that even if "the Court of Appeal erred in remanding on the section 190.5 issues, reinstatement of LWOP is still not the proper remedy. Due process and the interests of justice plainly require remand for the Court of Appeal to: [1] address appellant's separate arguments regarding abuse of discretion and [2] other constitutional challenges to section 190.5 as applied here; and indeed to [3] rule more fully on both state and federal disproportionality challenges . . . ." (AAB 69.) Respondent agrees that remand is appropriate.

First, Moffett argued below that the trial court abused its discretion by giving too much weight to the impact of his actions on victim Rima Bosso; misstating facts about the crime; and misstating Moffett's prior record. (A133032 AOB 48–56.) As discussed above, Moffett forfeited those claims and any errors were harmless. Nevertheless, the Court of Appeal did not reach those claims and should be given the opportunity to address them on remand. (See *Burden v. Snowden* (1992) 2 Cal.4th 556, 570.)

Second, Moffett argued below that section 190.5 is unconstitutionally vague and arbitrary and violates equal protection. (AAB 69; see A133032 AOB 58–62.) Those claims have already been raised and rejected by California courts. (See, e.g., *Guinn*, *supra*, 28 Cal.App.4th at pp. 1141–1143.) Nevertheless, the Court of Appeal should be given the opportunity

[5] Respondent respectfully requests an opportunity to brief this issue if this Court decides to address it on the merits. (See Cal. Rules of Court, rule 8.516(a)(2).)

to address those deferred claims on remand. (See *Burden v. Snowden*, *supra*, 2 Cal.4th at p. 570.)

Third, Moffett argued below that the LWOP sentence violated the California Constitution and Eighth Amendment protections from cruel and unusual punishments. The Court of Appeal implicitly rejected that claim when it declined to order the trial court to reduce the term to 25 years to life. In support of that determination, the court noted that *Miller* "declined to consider the defendants' alternative argument that the Eighth Amendment categorically bars LWOP sentences for juveniles, even for those who were 14 years of age or younger at the time of their offenses." (Typed Opn. at p. 13, citing *Miller*, *supra*, 132 S.Ct. at p. 2469.) By refusing to exclude LWOP as an appropriate penalty for Moffett, and holding that either LWOP or 25 years to life was appropriate so long as the trial court first considered Moffett's "'twice diminished moral culpability,'" the Court of Appeal implicitly rejected Moffett's proportionality claim. Nevertheless, because remand is appropriate on the other claims, the Court of Appeal should be given the opportunity to also address Moffett's proportionality claim more fully. (See *Burden v. Snowden*, *supra*, 2 Cal.4th at p. 570.)

CONCLUSION

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

Dated: June 21, 2013

Respectfully submitted,

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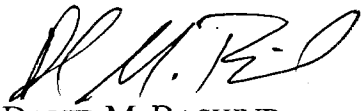

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S REPLY BRIEF uses a 13 point Times New Roman font and contains 8,400 words.

Dated: June 21, 2013

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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 June 21, 2013, I served the attached **RESPONDENT'S REPLY 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 June 21, 2013, at San Francisco, California.

E. Rios
Declarant

E. Rios
Signature

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