Filed 12/7/12; opnion on remand

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JIMMY SIACKASORN, Defendant and Appellant.	C065399a (Super. Ct. No. 07F11789) OPINION ON REMAND

APPEAL from a judgment of the Superior Court of Sacramento County, Cheryl Chun Meegan, Judge. Affirmed in part and reversed in part.

Ann Hopkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of the Factual Background and all of parts I. through VI., inclusive, of the Discussion.

 (*SEE DISSENTING OPINION*)

A jury convicted defendant Jimmy Siackasorn of first degree special-circumstance murder. Pursuant to Penal Code section 190.5, subdivision (b) (section 190.5(b)),[1] the trial judge sentenced defendant, who was 16 years old at the time of the offense, to life without the possibility of parole (LWOP). In a previous opinion, we affirmed.[2]

After we filed our opinion, the United States Supreme Court decided *Miller*, *supra*, 567 U.S. ___ [183 L.Ed.2d 407]. *Miller* held that the federal Constitution's Eighth Amendment ban on "cruel and unusual punishment" prohibits *mandatory* LWOP sentences for those under the age of 18 at the time of their offenses. (*Miller*, at p. ___ [183 L.Ed.2d at pp. 414-415]) In light of *Miller*, our state Supreme Court granted review and transferred this matter to us to reconsider our decision.

We have now reconsidered. We affirm the judgment of conviction, by readopting our prior nonpublished opinion. However, in the new, published part VII. of this opinion, we reverse the judgment of sentence; we remand for the trial court to resentence defendant in light of *Miller* and, as we shall explain, without considering an LWOP sentence as the presumptive sentencing choice. (See *Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 709, fn. 12; Cal. Rules of Court, rule 8.528(c) [if the state Supreme Court grants review on limited issues, the remaining issues will be decided by the original Court of Appeal opinion, or upon subsequent action by the Court of Appeal as directed by the Supreme Court].)

Although section 190.5(b) does not *mandate* an LWOP sentence, it has been interpreted, in California appellate court decisions issued before *Miller*, as making LWOP the "generally mandatory," "presumptive" penalty choice (as opposed to 25 years

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[1] Further undesignated statutory references are to the Penal Code.

[2] *People v. Siackasorn* (C065399, May 17, 2012) 2012 Cal.App. Lexis 3690 (nonpub. opn.), remanded (S203568, Aug. 29, 2012) in light of *Miller v. Alabama* (2012) 567 U.S. ___ [183 L.Ed.2d 407] (*Miller*).

to life). We do not believe such a presumptive punishment constitutionally squares with *Miller*. As we see it, in light of *Miller*, section 190.5(b) provides a sentencing judge with equal discretion to impose a sentence of LWOP or a sentence of 25 years to life; neither sentence being the preferred one.

PROCEDURAL BACKGROUND

A jury convicted defendant, who was tried as an adult, of first degree murder of a police officer. (§ 187, subd. (a).) The jury found true allegations that defendant intentionally and knowingly killed the officer while the officer was performing his duties, and that defendant intentionally and personally discharged a firearm causing the death. (§ 190.2, subd. (a)(7), former § 12022.53, subd. (d).) The jury found not true an allegation that the murder was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).)

Defendant committed the offense about five weeks shy of his 17th birthday. Sentenced to a prison term of LWOP, plus a consecutive sentence of 25 years to life for the firearm finding, defendant appeals. He raises evidentiary admissibility and sufficiency issues—and an instructional contention—regarding the first degree murder elements of premeditation and deliberation. He also claims his sentence is unconstitutionally cruel and unusual because an LWOP sentence for a juvenile is *categorically* prohibited under the Eighth Amendment. Finally, he asks that we review the sealed record of his *Pitchess*[3] motion concerning any discoverable information in the slain officer's personnel file.

In light of the Supreme Court's remand, the parties have filed supplemental letter briefs. As alluded to above, we reject defendant's contentions and shall affirm the

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3 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. We previously reviewed that sealed record and found the trial court did not abuse its discretion in concluding there was nothing discoverable therein. (*People v. Cruz* (2008) 44 Cal.4th 636, 670.)

judgment of conviction. However, we reverse the judgment of sentence and remand for the trial court to resentence defendant in light of *Miller* and without considering an LWOP sentence as the presumptive sentencing choice.

FACTUAL BACKGROUND*

Defendant concedes that he shot and killed Deputy Sheriff Vu Nguyen on the afternoon of December 19, 2007. Aside from the constitutionality of defendant's sentence, the basic issues on appeal involve the evidence of (1) defendant's premeditation and deliberation, and (2) his knowledge that Nguyen was a police officer.

On that December afternoon, Detective Nguyen and his partner in the Sacramento County Sheriff's Gang Suppression Unit, Detective Ed Yee, were ascertaining gang information while traveling in an unmarked, but well-known gang unit car (silver Nissan Maxima), when they noticed a young Asian male in front of Lucky Chanthalangsy's (Lucky) house, a known hangout for the Tiny Raskal Gang (TRG). The officers decided to contact the person.[4]

When the officers and the person spotted one another, the person started to walk away from them, and eventually sprinted away after Detective Yee drove into an oncoming traffic lane in pursuit. Detective Nguyen jumped out of the vehicle and chased the person on foot near Lucky's house, while Detective Yee continued the pursuit in the car.

Detective Yee saw Detective Nguyen jump a backyard fence and then lost contact with him. During this pursuit, Yee heard faint sounds, which he later concluded had been gunshots.

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* See footnote, *ante*, page 1.

4 The defense did not dispute that this person was defendant.

After not receiving a response from Detective Nguyen, Detective Yee got out of the car and climbed over some fences and onto a chicken coop, where he found Nguyen lying on his back. Nguyen had been shot three times—in the neck, in the abdomen, and in the lower back. All three injuries were potentially fatal. Nguyen's finger was on the trigger of his gun, but the gun had not been fired.

Lucky's father witnessed the foot chase and the shooting. He had told law enforcement that the victim did not have time to get his gun before being shot, but at trial he stated that it looked like the victim was reaching for his gun when a shot sounded and the victim fell down.

Defendant ran up to a couple after the shooting and asked them, without success, if they would give him a ride to the light rail station because he "just shot a cop."

Evidence involving defendant's state of mind and knowledge also included the following. It was commonly known in the area in which defendant was spotted that gang-unit police personnel drove silver or gray Nissan Maximas; this personnel was commonly referred to by gang members as "task force" or simply "task"; and defendant admitted that he was a TRG member. It was clear to Detective Yee that the person he pursued on the afternoon of the shooting had recognized Yee's car as a law enforcement vehicle. Shortly after the shooting, defendant told his cousin (a TRG member) that he had "bust[ed] on task," meaning he had shot a cop; defendant told another TRG member that he had shot a cop. On the day of the shooting, defendant had an outstanding warrant. There was evidence that Detective Nguyen, at the time of the shooting, had his police badge on a chain around his neck.

Additional evidence involving defendant's state of mind and knowledge included (1) incriminating statements that defendant made to a police photographer following a post-shooting police interview; (2) defendant's prior misconduct and accompanying threats to probation officers and to custodial staff while in juvenile custody; and (3)

expert and lay opinion testimony on the TRG mindset concerning police officers. Since defendant claims the trial court erroneously admitted these three items of evidence, we will discuss them in detail when we discuss these issues.

DISCUSSION

I. The Trial Court Properly Admitted Certain Statements That Defendant Made to a Police Photographer*

A. Background

On December 20, 2007, at around 2:10 a.m., after being arrested around midnight and left alone shackled to an interview table at the police station for about 50 minutes, defendant was interviewed by Detective Clark[5] and Detective Stanley Swisher. The interview was recorded and transcribed.

Defendant was read and confirmed he understood his *Miranda*[6] rights, and expressed his willingness to talk.

Detectives Clark and Swisher continued to interrogate defendant until 3:53 a.m. Toward the end of that phase of the interrogation, defendant stated twice within a short period of time that he did not want to talk any more.

At this point, Detective Swisher said "okay" and the detectives left the interview room, but just two minutes later, they returned and resumed the questioning. Shortly thereafter, defendant confessed.

Detectives Clark and Swisher concluded the interrogation at about 4:10 a.m., leaving the room after telling defendant that someone would be coming in to take pictures of him.

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* See footnote, *ante*, page 1.

5 Detective Clark did not testify at trial and his first name does not appear in the record.

6 *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

About three minutes later, a police photographer, Deputy Sam Bates, entered the interview room with Detective John Linke (who had not participated in defendant's questioning, and who was not involved in the photographing or in eliciting any statements from defendant during the photographing).

As the police photographer asked defendant to position himself for a photograph, defendant blurted out, "That cop deserved it though." The photographer responded, "Excuse me?" and defendant repeated his statement. The photographer told defendant that he would be best served to say nothing. Defendant replied, "What are you going to beat my ass or something?" After more positioning and photographs, defendant added, "Lucky I didn't see you on the street. Would have shot your ass, too."

Not long thereafter, as the photographing proceeded, defendant stated, "Oh, that's the same cop that beat up the homie before anyways so he—he deserve what he got." Defendant also boasted of the violent acts he would commit while incarcerated.[7]

After these statements, Detective Swisher, one of the two detectives who had previously questioned defendant, returned to the interview room and again questioned defendant. The trial court also excluded these questions and answers.

B. Analysis

Defendant contends that his statements to the police photographer that were admitted into evidence were both involuntary and the tainted product of his coerced confession, and thus should have been suppressed. We disagree.

Because defendant's statements to the photographer were admitted for all purposes in the prosecution's case-in-chief, the statements must have been voluntarily made and

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[7] The photographer also performed a gunshot residue test on defendant, which led defendant to make some more incriminating remarks. These remarks were intertwined with accompanying questions from the photographer, causing the trial court to suppress these remarks from defendant.

not obtained in violation of *Miranda*. (See *Harris v. New York* (1971) 401 U.S. 222, 223-225 [28 L.Ed.2d 1, 3-5].)

We determine the legal issue of the voluntariness of a statement or a *Miranda* violation independently of the trial court, based on all the supported surrounding circumstances found by the trial court. (*People v. Davis* (2009) 46 Cal.4th 539, 586; see *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 [36 L.Ed.2d 854, 862].) At trial, the prosecution is required to prove voluntariness and compliance with *Miranda* by a preponderance of the evidence. (*People v. Markham* (1989) 49 Cal.3d 63, 67, fn. 3, 71; see *Lego v. Twomey* (1972) 404 U.S. 477, 489 [30 L.Ed.2d 618, 627].) We will start with the alleged *Miranda* violation.

1. Miranda Violation.

The trial court correctly concluded that Detectives Clark and Swisher violated defendant's *Miranda* rights after resuming their questioning of him shortly after his second statement that he did not want to talk anymore; and the court correctly suppressed defendant's statements to the officers after this violation, including his confession.

However, a statement obtained after a *Miranda* violation can be admitted if it can be separated from the circumstances surrounding the *Miranda* violation—i.e., if the *Miranda* taint was sufficiently attenuated when the subsequent statement was made. (*Oregon v. Elstad* (1985) 470 U.S. 298, 318 [84 L.Ed.2d 222, 237-238]; *Clewis v. Texas* (1967) 386 U.S. 707, 710 [18 L.Ed.2d 423, 427].) That is the case here regarding defendant's statements to the police photographer that the trial court admitted into evidence.

The photographer appeared only after Detectives Clark and Swisher had ended their initial interrogation of defendant. With regard to the statements admitted into evidence, the photographer simply directed defendant how to pose for the photographs; the photographer did not initiate interrogation or prompt defendant to make the

statements. In fact, the photographer admonished defendant to say nothing. There was a detective on the scene—Detective Linke—but Linke had not questioned defendant, and he was not involved in the photographing. In short, photographing defendant was an act independent of interrogating him.

We conclude the trial court did not violate *Miranda* regarding the statements that defendant made to the police photographer, which the trial court admitted into evidence.

2. Voluntariness.

We also conclude, in considering "the totality of the circumstances," that the statements that defendant made to the police photographer that were admitted into evidence were voluntary. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 285-286 [113 L.Ed.2d 302, 315-316].)

As the Attorney General notes, there is nothing in the record to indicate that defendant's admitted statements to the police photographer were anything but voluntary. Without any prompting on the photographer's part, defendant began jabbering at him about the case. In fact, defendant continued to volunteer statements even after the photographer warned him to say nothing. The session with the photographer cannot be considered a continuation of the *Miranda*-violative interrogation by Detectives Clark and Swisher. As explained above, photographing defendant was an act independent of interrogating him.

II. The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of Juvenile Custody Misconduct and Threats

Defendant contends the trial court abused its discretion under Evidence Code sections 1101 and 352 in admitting into evidence six instances of defendant's misconduct and threats to staff while in previous juvenile custody. We disagree.

Evidence Code section 1101 prohibits the introduction of character evidence to prove conduct on a specific occasion, but permits evidence of prior bad acts if relevant to

show motive, intent, knowledge, and the like, regarding the present crime. Under Evidence Code section 352, a trial court weighs the probative value of such evidence against its prejudicial effect. We review a trial court's decision to admit such evidence under the abuse of discretion standard. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

Here, the trial court admitted evidence of six incidents when defendant was in juvenile custody in which he physically lashed out or violated a rule, and when disciplined by custodial officers or probation officers, threatened to shoot or beat them. In some of these incidents, defendant threatened to take action "on the outs," i.e., when he was on the outside. In one incident, defendant had to be pepper sprayed after refusing to stop punching a wall. In another, he told a probation officer who had arrested him that the officer was lucky defendant did not know he was coming—"we would have had to . . . shoot it out."

As the trial court instructed the jury, this evidence could be considered only for the limited purpose of determining defendant's "mental state, motive, opportunity, intent, knowledge, absence of mistake, or state of mind," regarding the present offense.

As noted, the critical issues in this case concerned defendant's mental state and knowledge at the time of the shooting. The challenged evidence was relevant on those issues.

Defendant disagrees. He argues that these threats were directed against juvenile facility custodial officers and probation officers, not police officers, and were never carried out; they showed only his propensity for violence and criminal disposition, evidentiary areas prohibited under Evidence Code sections 1101 and 352.

We find parallels between the present case and *People v. Pertsoni* (1985) 172 Cal.App.3d 369 (*Pertsoni*), in which the trial court properly admitted certain

evidence under Evidence Code sections 1101 and 352. In *Pertsoni*, the defendant was charged with murdering a Yugoslavian whom the defendant claimed worked for the Yugoslav secret police. The trial court admitted evidence that four years prior to the murder the defendant had participated in a demonstration against the Yugoslav Consulate in which he fired four shots at a man he believed was the Yugoslav Ambassador. (*Pertsoni*, at p. 372.)

The appellate court in *Pertsoni* noted that the defendant's state of mind was the only issue in the case. (*Pertsoni*, *supra*, 172 Cal.App.3d at p. 375.) The prosecution theory was that the killing was premeditated, whereas the defendant claimed self-defense. (*Id.* at pp. 373-374.) The evidence of the consulate incident, said *Pertsoni*, showed "the lengths to which [the defendant's] passionate hatred of anyone connected with the Yugoslav government would take him"; this evidence "tended logically to show that [the defendant's] motive in killing [the present victim] was to eliminate an agent of the Yugoslav government." (*Id.* at pp. 374, 375.)

Similarly, here, defendant's state of mind was the only issue in the case. The prosecution claimed premeditation while defendant countered with self-defense. Although the challenged incidents did not involve police officers per se, the incidents involved probation officers and juvenile facility custodial officers—in other words, law enforcement-related personnel, and reflected defendant's state of mind toward such personnel when they exercised authority over him.

We conclude the trial court did not abuse its discretion in admitting the evidence of the six incidents under Evidence Code sections 1101 and 352.

Also, the trial court did not abuse its discretion in admitting evidence that defendant, about a half-hour before the shooting, showed his firearm to a fellow TRG member and said he was going to go shoot up a house. This evidence exemplified an offensive rather than a defensive state of mind.

III. Opinion Evidence on Typical Gang State of Mind Did Not Violate Due Process

Defendant contends the trial court denied him due process in admitting an expert opinion and a lay opinion involving, respectively, the typical mindset of a gang member who claims membership "for life" and a typical TRG view of the police.

A trial court's decision to admit an expert opinion or a lay opinion is reviewed for abuse of discretion. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299; *People v. Medina* (1990) 51 Cal.3d 870, 887.) The admission of relevant evidence will not offend due process unless the evidence is so prejudicial that it renders the defendant's trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) As will become clear from the following discussion of these expert and lay opinions, this due process line was not crossed here and the trial court did not abuse its discretion in admitting this evidence.

A. Expert Opinion

There was evidence that defendant had stated to a police officer in March 2007 that he was TRG "for life."

A gang expert later testified that a gang member saying he was "for life" was a "very common" gang expression, and meant the gang member had "really [i]mbibed" the lifestyle, cause, and values of the gang. The expert then immediately stated that a gang member could earn "respect" within the gang by fighting an enemy, including killing a cop.

A gang expert is prohibited from opining on a specific gang member-defendant's state of mind, but the expert may testify regarding the culture and habits of gangs from which the jury may infer a state of mind. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550-1551.)

Defendant argues that the gang expert here impermissibly opined on the subjective belief system of *anyone* who uttered the phrase "for life," because such testimony was without foundation. But the expert, as an expert, testified to the ubiquity of this phrasing and his experience with it, a ubiquity that served as the foundation for the expert's opinion. Moreover, the gang expert properly opined on the typical state of mind of gang members who utter this phrase, and not improperly on defendant's own state of mind. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371 [gang expert's "testimony focused on what gangs and gang members typically expect and not on [the gang member-defendant's] subjective expectation in this instance"].)

B. Lay Opinion

A lay witness opined that TRG had a "strong–ass hatred over officers" and that TRG saw this attitude "as part of the gang life."

Defendant contends that no foundation was laid for the admission of this opinion. We disagree.

As relevant, Evidence Code section 800 allows a lay opinion if it is rationally based on the witness's perception. (Evid. Code, § 800, subd. (a).) Here, it was. Although the lay witness was not a gang member, she socialized with TRG members, knew about the gang and those who lived in her neighborhood, and knew their views about police officers.

Defendant also claims this opinion did nothing to help the jurors understand the witness's testimony. (Evid. Code, § 800, subd. (b).) However, defendant provided no argument in his opening brief on this point; consequently, he forfeited this claim. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

IV. Sufficient Evidence of Premeditation and Deliberation

Defendant contends there is insufficient evidence of premeditation and deliberation to support his first degree murder conviction. We disagree.

In reviewing this evidentiary sufficiency issue, we must determine whether, after viewing the evidence in the light most favorable to the judgment, a rational trier of fact could have found premeditation and deliberation beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 577.)

" 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." ' " (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) The requirement of premeditation and deliberation excludes homicides that are "the result of mere unconsidered or rash impulse hastily executed." (*People v. Thomas* (1945) 25 Cal.2d 880, 900-901.)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), the court identified three categories of evidence typically found in premeditated and deliberate first degree murder: planning, motive, and manner of killing (*id.* at pp. 26-27). Where there is little or no evidence of planning, as here, evidence of motive together with the manner of killing may suffice. (*Id.* at p. 27.)

Defendant repeatedly claimed "That cop deserved it." He also stated, "That's the same cop that beat up [one of defendant's] homie[s] before." This constitutes evidence of motive. So too does the fact that defendant, who had an outstanding warrant, tried to elude Detective Nguyen and shot the officer when he (defendant) realized there was no other way out. As the Attorney General correctly noted, while defendant was running, he

had sufficient time to reflect on and weigh a decision to turn around and shoot Detective Nguyen, who was on his trail. (See *People v. Memro* (1995) 11 Cal.4th 786, 863 [a rational jury could conclude that premeditation and deliberation occurred during the time it took the defendant to run about 60 yards].) Nor is it required that defendant have specifically targeted Detective Nguyen. Ample evidence was presented that defendant had previously threatened to shoot law enforcement-related personnel who tried to exercise authority over him. (See *Pertsoni*, *supra*, 172 Cal.App.3d at pp. 373-375 [evidence of hatred of Yugoslav officials in general showed criminal motive in killing one].)

There was also evidence of "a manner of killing from which the jury could reasonably infer that the [shooting was] deliberately calculated to result in death." (*Anderson*, *supra*, 70 Cal.2d at pp. 33-34.) As the Attorney General observed, there was evidence that defendant turned, and shot Detective Nguyen not once but three times, hitting him in critical areas like the neck, abdomen, and back so rapidly that the detective could not return fire before becoming incapacitated.

Defendant argued that the evidence does not show a cold, calculated killing. The whole unplanned incident happened very quickly. Defendant noted that he was unexpectedly spotted and then chased by a member of law enforcement, while carrying a gun that had been given to him earlier by another TRG member simply to hold. Once spotted, defendant fled, over fences and chicken coops. He impulsively shot only when he had nowhere else to run, and only after the detective was going for his own weapon. This is one way to view the evidence, but, as explained above, not the only way, and is not the view most favorable to the judgment.

We conclude there is sufficient evidence of premeditation and deliberation.

V. Trial Court Properly Responded to Jury's Question on Premeditation and Deliberation

During deliberations, the jury twice asked the trial court to clarify the following sentence in a standard instruction on premeditated and deliberate murder: "The defendant acted with *premeditation* if he decided to kill before committing the act that caused death." (CALCRIM No. 521.) Specifically, the jury inquired, "Does this [sentence] mean that the premeditation has to be with regard to considering this particular death?"; in other words, "Does thinking about and/or threatening to kill any member of a particular group constitute premeditation for later killing a member of that group?"

As pertinent, the trial court answered the jury's inquiry as follows: "Evidence that a defendant 'thought about and/or threatened to kill' a member of a particular group can be considered in deciding whether the defendant acted with premeditation and deliberation when he committed the act causing the death of a member of that group. The People must prove that the defendant acted with premeditation and deliberation in connection with the charged crime."

Defendant contended the trial court's answer improperly lowered the prosecution's burden of proving beyond a reasonable doubt the element of premeditation, by allowing conviction without a finding that defendant premeditated the *charged* killing. We disagree.

The trial court's answer told the jurors they would be deciding whether defendant "*acted with* premeditation and deliberation *when* he committed the act causing the death[.]" (Italics added.) The trial court then reiterated that the People must prove that "defendant *acted with* premeditation and deliberation *in connection with the charged crime.*" (Italics added.) Defendant was charged with murder. Pursuant to the trial court's answer, the jury could not reasonably have convicted defendant without finding that he premeditated the *charged* killing.

VI. The LWOP Sentence Is Not Categorically Prohibited Under the Eighth Amendment

Defendant claims that an LWOP sentence for a 16 year old (about five weeks shy of 17) is categorically prohibited as an unconstitutional, cruel and unusual punishment under the federal Eighth Amendment. We disagree.

Section 190.5(b) states that 16 or 17 year olds who are tried as adults and convicted of a first degree special-circumstance murder under section 190.2 (like defendant here, § 190.2, subd. (a)(7)—an intentional and knowing killing of a police officer engaged in his duties) be given an LWOP sentence, unless the trial court, in its discretion, determines that a sentence of 25 years to life should be imposed.

Two recent decisions, one from the First Appellate District, *People v. Blackwell* (2011) 202 Cal.App.4th 144 (*Blackwell*), and the other from the Second Appellate District, *People v. Murray* (2012) 203 Cal.App.4th 277, have concluded that the Eighth Amendment does not categorically bar LWOP sentences for 16- or 17-year-old first degree special-circumstance murderers tried as adults. (*Blackwell*, *supra*, 202 Cal.App.4th at pp. 147, 155-158; *Murray*, *supra*, 203 Cal.App.4th at pp. 280, 283-284.) *Blackwell* involved a 17 year old who was convicted of first degree murder during an attempted robbery inside the victim's home. *Murray* concerned a 17-year-old multiple murderer. We agree with these two decisions.

The United States Supreme Court, in *Graham v. Florida* (2010) 560 U.S. ___ [176 L.Ed.2d 825] (*Graham*), held that the Eighth Amendment prohibits an LWOP sentence for juvenile offenders who have *not* committed a homicide. (*Id*. at p. ___ [176 L.Ed.2d at p. 845].)

As *Blackwell* noted, the high court in *Graham* applied a two-step approach appropriate for determining categorical challenges to punishment as cruel and unusual. (*Blackwell*, *supra*, 202 Cal.App.4th at p. 157.)

In the first step, a court considers whether there is a national consensus against the sentencing practice at issue. (*Blackwell*, *supra*, 202 Cal.App.4th at p. 157.) Defendant concedes that 40 states and the federal system actively sentence juveniles to LWOP terms. If anything, the national consensus is counter to defendant's position.

In the second step, a court, guided by judicial interpretation of the Eighth Amendment's text, history, meaning and purpose, independently determines whether the LWOP sentence violates the Constitution. (*Blackwell*, *supra*, 202 Cal.App.4th at p. 157.) Defendant has not cited any Eighth Amendment jurisprudence, other than *Graham*, *supra*, 560 U.S. ___ [176 L.Ed.2d 825] and *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1] (*Roper*) (juvenile offenders cannot be sentenced to death), supporting his claim of an LWOP categorical bar here. In *Blackwell*, the court concluded, "The reasoning of *Graham* [which distinguished juveniles from adults in terms of brain development, capacity for change, and moral culpability, and noted the severity and irrevocability of murder, in prohibiting LWOP sentences for juvenile nonhomicide offenders] cannot be stretched to categorically bar LWOP sentences for juveniles who [as in *Blackwell*] aid and abet a homicide, particularly when that homicide is a first degree special[-]circumstance murder." (*Blackwell*, *supra*, 202 Cal.App.4th at p. 158.)

Even more so, *Graham* cannot be stretched to categorically bar LWOP sentences for a 16-year-old juvenile (about five weeks shy of 17) who intentionally and knowingly kills a police officer engaged in his duties (a special circumstance—§ 190.2, subd. (a)(7)), and does so with first degree murder culpability. [THE REMAINDER OF THE OPINION IS TO BE PUBLISHED.]

VII. There Is No Presumptive Punishment Choice Under Section 190.5(b)*

Section 190.5(b) states with respect to 16 and 17 year olds tried as adults and convicted of first degree special-circumstance murder:

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

Based on the text, structure and history of this statute, California appellate court decisions have interpreted section 190.5(b) as setting forth LWOP as "the *generally mandatory* . . . [and] *presumptive* punishment for 16- or 17-year-old special-circumstance murderers, and the [sentencing] court's discretion [as] concomitantly circumscribed to that extent." (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1141-1142, italics added (*Guinn*); *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1088-1089 (*Ybarra*) [accord].)

Subsequent to these California decisions and to our original opinion in this matter**,** the United States Supreme Court, in late June 2012, decided *Miller*, *supra*, 567 U.S. ___ [183 L.Ed.2d 407]. *Miller* held that a *mandatory* LWOP sentence for any juvenile offender (i.e., under the age of 18 at the time of the offense) violates the federal Constitution's Eighth Amendment ban on "cruel and unusual punishments." (567 U.S. at p. ___ [183 L.Ed.2d at pp. 414-415, 424].)

Miller based its decision on two strands of high court precedent concerned with the concept of proportionate punishment, a concept central to the Eighth Amendment. Such a mandatory LWOP scheme, said *Miller*, (1) prevents the sentencing authority, be it

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* See footnote, *ante*, page 1.

"judge or jury," from considering a juvenile's " 'lessened culpability' " and "greater 'capacity for change' " (relative to adults) (*Graham*, *supra*, 560 U.S. ___ [176 L.Ed.2d 825]; *Roper*, *supra*, 543 U.S. 551 [161 L.Ed.2d 1]), and (2) does not meet the requirement of "individualized sentencing" for defendants facing the most serious penalties (see *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [49 L.Ed.2d 944, 961] (plur. opn.); *Lockett v. Ohio* (1978) 438 U.S. 586, 597-609 [57 L.Ed.2d 973, 985-992] (plur. opn.); see also *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-112 [71 L.Ed.2d 1, 8-9] (plur. opn.)). (*Miller*, *supra*, 567 U.S. at p. ___ [183 L.Ed.2d at pp. 414, 415, 417-418, 421-422].)

LWOP is the harshest possible penalty constitutionally available for juveniles, in light of *Roper*'s holding that the Eighth Amendment prohibits the death penalty for juvenile offenders, and *Graham*'s holding that the Eighth Amendment prohibits LWOP for a juvenile convicted of a non-homicide offense. (See *Miller*, *supra*, 567 U.S. at p. ___ [183 L.Ed.2d at pp. 417-418, 430.) The *Miller* court characterized its decision as requiring only that a "sentencer" ("judge or jury") "follow a certain process" before imposing this harshest possible penalty on a juvenile offender: i.e., consider the offender's youth and the hallmark features of youth (among them, immaturity, impetuosity, and failure to appreciate risks and consequences); and consider, in an individualized way, the nature of the offender and the offense (for example, as relevant, the offender's background and upbringing, mental and emotional development, and possibility of rehabilitation). (*Miller*, at p. ___ [183 L.Ed.2d at pp. 426, 422-423, 421-422]; see also *id.* at p. ___ [183 L.Ed.2d at pp. 414-415, 417-418, 430].)

For five reasons, we think *Miller* has undercut the *Guinn* interpretation of section 190.5(b), that LWOP is the "*generally mandatory* . . . [and] *presumptive* punishment for 16- or 17-year-old special-circumstance murderers, and the [sentencing] court's discretion is concomitantly circumscribed to that extent." (*Guinn*, *supra*, 28 Cal.App.4th

at p. 1142, italics added.) We do not think there is a preferred or presumptive punishment under section 190.5(b); the sentencing court has equal discretion to impose either LWOP or the 25-year-to-life penalty after considering which sentence is appropriate in line with *Miller*'s required process.

First, *Miller* stressed that LWOP is the "harshest possible penalty" constitutionally available for a juvenile offender. (*Miller, supra,* 567 U.S. at p. ___ [183 L.Ed.2d at pp. 430, 424, 417, 421-422].)

Second, *Miller* remarked that "given all we have said in *Roper, Graham,* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* 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.' [Citations to *Roper* and *Graham.*] Although we do not foreclose a sentencer's ability to make that judgment [i.e., LWOP] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller, supra,* 567 U.S. at p. ___ [183 L.Ed.2d at p. 424].)

Third, *Guinn*'s interpretation of section 190.5(b) was based on *statutory* text, structure and history. (*Guinn, supra,* 28 Cal.App.4th at pp. 1141-1142.) This statutory-based interpretation is trumped by *Miller*'s grounding in the *constitutional* provision of the Eighth Amendment.

Fourth, *Guinn* interpreted section 190.5(b) as setting forth a "*generally mandatory* imposition of LWOP as the punishment for a youthful special circumstance murderer." (*Guinn, supra,* 28 Cal.App.4th at p. 1142, italics added.)

Fifth, and finally, there is an adage in the law that statutes should be interpreted whenever possible to preserve their constitutionality. (*Dyna-Med., Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)

In their supplemental briefing on this issue, the People assert that "*Miller* does not require a formulaic recitation of every possible factor related to a defendant's youth that could possibly affect the court's sentencing decision." We agree. To so require would render the determination of a sentence just that—a formulaic recitation. That is the last thing *Miller* had in mind. What *Miller* does require is that the sentencer, in imposing the harshest possible penalty on a juvenile (i.e., LWOP), consider the offender's youth and the hallmark features of youth that are indicative of lesser culpability and greater capacity for change (compared to adults), and individually consider the offender and the offense. This sentencing process is not an unfamiliar one. Courts have been engaging in like processes for as long as they have been imposing sentences.[8]

Here, the trial court judge did not have the benefit of *Miller*'s constitutional guidance in sentencing under section 190.5(b). Instead, the judge was obligated to follow the LWOP-presumptive punishment interpretation of that statute from the appellate court decisions in *Guinn* and *Ybarra.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The constitutional protections recognized in *Miller* apply to defendant because his case is not yet final. (*Griffith v. Kentucky* (1987) 479 U.S. 314, 322, 328 [93 L.Ed.2d 649, 658, 661].) A sentencing remand, then, is necessary so the trial court can exercise

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8 Furthermore, in considering the sentence to impose, the sentencing court may use the sentencing factors on aggravation and mitigation listed in the California Rules of Court, and the sentencing factors stated in section 190.3, as relevant. (See *Guinn, supra,* 28 Cal.App.4th at p. 1149, 1142-1143; *Ybarra, supra,* 166 Cal.App.4th at p. 1089, 1092.)

its discretion to impose a sentence of LWOP or a sentence of 25 years to life, without having to consider LWOP as the "generally mandatory" or "presumptive" choice.

As one would expect from this legal posture of *Miller*'s unavailability to the sentencing court, the sentencing record demonstrates the necessity of a sentencing remand too. In sentencing defendant to LWOP, the trial court characterized that sentence as "the sentence stated by law." Defense counsel had expressed a similar sentiment at the sentencing hearing, in noting the circumscribed sentencing discretion available to the trial court. The probation report did not even mention section 190.5(b); instead, the report simply stated that, "[p]ursuant to Section 190.2[, subdivision] (a)(7) [first degree special-circumstance murder of a peace officer] . . . , defendant . . . shall be sentenced to state prison for life without the possibility of parole."

Furthermore, the sentencing record shows that the "certain process" mandated in *Miller* for juvenile LWOP sentencing was not fully applied here. (*Miller*, *supra*, 567 U.S. at p. ___ [183 L.Ed.2d at pp. 413-414, 425-426].) The trial court articulated its LWOP sentencing considerations in the context of denying defendant's motion that a juvenile LWOP sentence is categorically unconstitutional, rather than in the context of considering section 190.5(b). In the context of denying that motion, the trial court noted defendant's "young age." The trial court also noted that it was familiar with the factors relating to defendant and to the commission of the present crime; that defendant had threateningly and abusively confronted authority figures repeatedly in the past; that he had embraced the violence and hatred of the gang culture and mindset; that he had shown no remorse, instead bragging and gloating about what he had done; and that this was a cold and vicious killing. However, the trial court did not consider, as *Miller* requires to the extent relevant, defendant's background and upbringing, and his mental and emotional development, and how these factors also affected the possibility of his rehabilitation; nor was any such information to be found in the probation report.

Finally, we are aware of two recent decisions involving the issue of *Miller* and section 190.5(b). In the first one, *People v. Gutierrez* (2012) 209 Cal.App.4th 646, the court concluded that, "[u]nlike in *Miller*," a juvenile LWOP sentence under section 190.5(b) is "not mandatory"—the juvenile "*may be* sentenced to life without the possibility of parole." (*Gutierrez*, at p. 659.) *Gutierrez* reached this conclusion without mentioning that *Guinn* and *Ybarra* had interpreted section 190.5(b) as making LWOP the "generally mandatory," "presumptive" sentence. (*Gutierrez*, at pp. 659-660.) The second decision, *People v. Moffett* (2012) 209 Cal.App.4th 1465, did note this judicial interpretation and concluded that a "presumption in favor of LWOP, . . . is contrary to the spirit, if not the letter, of *Miller* . . . ." (*Moffett*, at p. 1476.) In light of what we have said, we agree with *Moffett* and disagree with *Gutierrez* on this point.

Consequently, we shall reverse the judgment of sentence and remand to the trial court for resentencing in light of *Miller*; the trial court is not to consider LWOP as the presumptive sentencing choice.

DISPOSITION

The judgment of conviction is affirmed. The judgment of sentence is reversed and this matter is remanded to the trial court for resentencing consistent with the principles expressed in this opinion. **(*CERTIFIED FOR PARTIAL PUBLICATION*)**

BUTZ, Acting P. J.

I concur:

HOCH, J.

Dissenting Opinion of Duarte, J.

I concur in the majority opinion except as to Part VII, as to which I respectfully dissent from the conclusion that a remand for resentencing is appropriate in this case.

Assuming the trial court erred under *Miller v. Alabama* (2012) 567 U.S. ___ [183 L.Ed.2d 407] (*Miller*), by applying a presumption in favor of the LWOP sentence, in my view the error was not structural, but harmless beyond a reasonable doubt based on this record. (See *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] (*Chapman*).)

Sentencing errors may be found harmless (*People v. Champion* (1995) 9 Cal.4th 879, 934), even capital sentencing errors (*People v. Holt* (1997) 15 Cal.4th 619, 693). Harmless error analysis even applies in capital cases where the sentencer places an improper "thumb" on the sentencing scale. (See, e.g., *Sochor v. Florida* (1992) 504 U.S. 527, 532 [119 L.Ed.2d 326, 336-337]; *Clemons v. Mississippi* (1990) 494 U.S. 738, 752-754 [108 L.Ed.2d 725, 740-742].) Application of an invalid sentencing presumption is not a structural error compelling reversal in all cases. (See *Washington v. Recuenco* (2006) 548 U.S. 212 [165 L.Ed.2d 466].)

In my view, *People v. Gutierrez* (2012) 209 Cal.App.4th 646 (*Gutierrez*), although admittedly sparse in its analysis of *Miller*, correctly concluded that a harmless error analysis was appropriate after finding *Miller* error. (*Gutierrez, supra,* 209 Cal.App.4th at p. 660.)[1]

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[1] The majority does not undertake an explicit harmless error analysis, or overtly classify the error as structural, but does rely in part on *People v. Moffett* (2012) 209 Cal.App.4th 1465 (*Moffett*). I have no quarrel with the decision to remand in *Moffett*. Moffett was not the shooter, and his conviction was for felony murder. Those facts (unlike defendant's facts) signaled Moffett's ""twice diminished moral culpability."" (*Moffett, supra,* 209 Cal.App.4th at p. 1477 [quoting *Miller*].) And, importantly, in *Moffett* the crime itself did not speak to Moffett's "maturity, prospects for reform, or mental state with respect to the homicide itself—the factors paramount under *Miller*." (*Ibid*.) Finally,

Here, the trial court essentially made the determinations required by *Miller*. It considered defense counsel's "lengthy written argument" against an LWOP sentence, based on the Eighth Amendment, and considered the then-recent opinion in *Graham v. Florida* (2010) 560 U.S. ___ [176 L.Ed.2d 825] (*Graham*). Further, the trial court presumptively considered the earlier decision in *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1), which, together with *Graham*, articulated the mitigating factors restated in *Miller*.

I do not read *Miller* to require the parties to litigate, and the trial court to resolve, each subcategory of factors referenced in *Miller* that might shed light on a minor's culpability or prospects for reform. *Miller* requires the sentencer to "have the ability to consider the 'mitigating qualities of youth[,]'" that is, "to 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" (*Miller, supra,* 567 U.S. at pp. ___-___ [183 L.Ed.2d at pp. 422-424].) Defense counsel raised those issues, with knowledge of the possible factors outlined in *Miller*, and borrowed from *Roper* and *Graham*. Because defense counsel had every "incentive and opportunity" to marshal evidence and argument pertaining to those factors, we can "be confident that the factual record would have been the same" (*People v. Sandoval* (2007) 41 Cal.4th 825, 839-840) had *Miller* been decided before sentencing.

In deciding defendant's Eighth Amendment motion, the trial court considered the evidence in the record relating to defendant's past, which, with his actions and utterances regarding his premeditated murder of a peace officer, spoke to his maturity and prospects for reform. The trial court considered defendant's age, delinquency history (which including repeated threats to shoot or harm juvenile correctional or probation staff) and removal from the family home, where he was the victim of substantial physical and

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the trial court misunderstood one part of Moffett's juvenile record—a record far milder than defendant's. (*Ibid*.)

psychological abuse, witnessed sexual abuse of his sister, and witnessed arrests of family members, all no doubt contributing to his resulting behavioral issues and depression.

The trial court acknowledged defendant's "very young age" but found he "had rejected essentially all the intervention of the juvenile justice system. He demonstrated in his numerous encounters with law enforcement, with probation, with group homes, his utter distain [*sic*], animosity, hatred towards any authority figure. He had embraced the gang lifestyle, he had embraced that culture and that mindset, which exalts violence and hatred. . . . He had made repeated death threats and challenged authority figures in the past, and exhibited numerous outbursts in defiance and acts of defiance and misbehavior in his interactions with different custodial settings." Defendant "executed" and "ambushed" the victim and "fled from law enforcement as he had done repeatedly in the past. And rather than being taking into custody, he gunned down Deputy Vu Nguyen at close range and left him to die." Defendant was "proud of what he's done. He's bragged and he's gloated." The trial court considered the argument for a lighter sentence, "[b]ut as I've stated and for those reasons that I have stated, I reject that argument and I reject it based on my review of the case law as well as a careful consideration of the facts relating to this defendant and this crime."

We have described the *Chapman* test as follows: "To find the error harmless we must find beyond a reasonable doubt that it did not contribute to the verdict, that it was unimportant in relation to everything else the jury considered on the issue in question." (*People v. Song* (2004) 124 Cal.App.4th 973, 984; see *Yates v. Evatt* (1991) 500 U.S. 391, 403-404 [114 L.Ed.2d 432, 448-449].) From my review of the record, it shows beyond a reasonable doubt that any presumption of LWOP as the appropriate sentence was "unimportant" in this case.

The trial court heard and rejected the argument that defendant's youth and unfortunate childhood merited a sentence other than LWOP, given his extensive juvenile record, premeditated murder of a peace officer, and utter lack of remorse. It sentenced

him to LWOP because it determined that his crimes and individual circumstances merited an LWOP sentence. Accordingly, on this record "[r]emanding for resentencing in light of *Miller* would be a futile exercise." (*Gutierrez*, *supra*, 209 Cal.App.4th at p. 660.)

Therefore, I respectfully dissent.

DUARTE, J.