

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LUIS ANGEL GUTIERREZ,

Defendant and Appellant.

Case No. S206365

~~Second Appellate District, Division Six, Case No. B227606~~
Ventura County Superior Court, Case No. 2008011529
The Honorable Patricia M. Murphy, Judge

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**SUPREME COURT
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ISSUE PRESENTED FOR REVIEW

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

INTRODUCTION

Penal Code section 190.5, subdivision (b), provides that defendants who were 16 or 17 years old when they committed special circumstance murder shall be sentenced to life without the possibility of parole (LWOP) “or, at the discretion of the court, 25 years to life.” After appellant was sentenced, but prior to appeal, the United States Supreme Court decided *Miller v. Alabama, supra*, 567 U.S. ___ [135 S.Ct. 2455] (*Miller*). *Miller* held that mandatory LWOP terms for minors for homicides violated the Eighth Amendment.

Appellant's Eighth Amendment challenge in this case fails for three reasons.

First, he never objected to his sentence, forfeiting a cruel and unusual punishment claim on appeal.

Second, under recent amendments to Penal Code section 1170, appellant's sentence now includes parole consideration and therefore offers him a chance for release.

Third, and unlike the defendant's sentence in *Miller*, appellant's LWOP sentence was not mandatory. Appellant was sentenced pursuant to section 190.5, subdivision (b), which provides that a juvenile defendant 16 years of age or older who is convicted of first degree, special circumstance

¹ On January 3, 2013, this Court granted review in the present matter and in *People v. Moffett* (2012) 209 Cal.App.4th 1465 [148 Cal.Rptr.3d 47, 51-53], S206771. This Court limited the issue to be briefed and argued in *Moffett* to the same issue presented here.

murder *may be* sentenced to life without the possibility of parole. The statute does not require a mandatory LWOP sentence and vests sentencing courts with the discretion to sentence the defendant to a term of 25 years to life with possibility of parole. It therefore does not violate the proscription against cruel or unusual punishment. In the present case, the trial court expressly considered all potentially relevant mitigating factors, including appellant's age, but determined the circumstances of the offense warranted a sentence of life without parole. The Court of Appeal correctly concluded that appellant's sentence complied with *Miller*. This case should be affirmed.

STATEMENT OF THE CASE

In an information filed by the District Attorney of Ventura County, appellant was charged with murder, a violation of Penal Code² section 187, subdivision (a). The information also alleged that appellant was 17 at the time of the crime and that he personally killed the victim within the meaning of Welfare and Institutions Code section 602, subdivision (b)(1). The information further alleged a special circumstance that the murder was committed when appellant was engaged in the commission and attempted commission of rape pursuant to section 190.2, subdivision (a)(17)(c), and that appellant personally used a deadly and dangerous weapon (a knife) within the meaning of section 12022, subdivision (b)(a). (1CT 46.)

Trial was by jury. The jury found appellant guilty of first degree murder, found the personal use and special circumstance allegations true, and found that appellant was over 14 years of age at the time of the crime. (2CT 322.) The court imposed the sentence of life without the possibility

² All further statutory references are to the Penal Code unless otherwise stated.

of parole, plus one year consecutively under section 12022, subdivision (b)(1). (2CT 339; 4RT 874, 876.)

On appeal, the California Court of Appeal rejected appellant's *Miller* and other contentions. As to the *Miller* contention, it reasoned that "[u]nlike *Miller*, appellant's LWOP sentence was not mandatory" because he was sentenced under section 190.5, subdivision (b), which gives "the discretion to sentence the defendant to a term of 25 years to life with possibility of parole." The court further noted, after quoting the trial court's statement of reasons for imposing the sentence, that "[t]he trial court was aware of its discretion and declined to impose a more lenient sentence. Remanding for resentencing in light of *Miller* would be a futile exercise." (*People v. Gutierrez* (2012) 147 Cal.Rptr.3d 249, 259-260.)

STATEMENT OF FACTS

A. Prosecution Case

Josephina Lanuza and her husband, Abel Gutierrez, lived in a house on Moffatt Circle in Simi Valley with their three sons (Omar, Isai and Saul) and several relatives, including her brother, Jose Luis Mendoza, Abel's nephew, Abraham Gutierrez, appellant, and his father, Jose Luis Gutierrez. (1RT 149-150, 2RT 214-215.)

On March 15, 2008, Abel and Josephina and their three children attended a birthday party for a nephew. The party was held at the home of Erika Gutierrez, a cousin. Abel, Josephina and their children returned home from the party sometime after 10:30 p.m. (2RT 197-198.) Appellant also attended the party and left before midnight, but returned after a while. He was drinking beer with others at the party. (2RT 247, 258-259.) Appellant remained at the party until approximately 2:30 a.m. (2RT 247-249, 257.)

Abel left home early the next morning at about 4:20 a.m., because he had to be at work at 5:00 a.m. Josephina was asleep in bed, wearing a nightgown. (2RT 204-206.) As Abel left, he saw appellant's car parked in front of the house. (2RT 207-209.) Appellant did not have permission to enter the couple's bedroom, and it was their practice to lock the bedroom when they were leaving. (2RT 197.)

At about 6:30 a.m., Abraham heard the door to Josephina and Abel's bedroom open, which he considered unusual because he knew that Abel had to be at work early in the morning, and Josephina normally did not get up until 7:30 or 8:00 a.m. on Sundays. (1RT 155-156.) Abraham got up, walked in the direction of the room and saw appellant in the kitchen, and noticed that appellant's hand was bleeding. Abel asked appellant what happened. (1RT 157-159.) Appellant told Abraham that he had gotten into a fight with a friend, Chano. (1RT 159.) Appellant was not wearing shoes. Mendoza was also present and noticed that appellant's hand was injured and that appellant was wearing socks but no shoes, which was unusual for appellant. Appellant was trying to cover his hand. (2RT 224-225.) About five minutes later, appellant left the house and departed in his car. (1RT 161.)

Mendoza went back to bed and when he later awoke, he noticed blood on the floor of the living room and in the hallway leading to Abel and Josephina's room. (2RT 228-229.) The door to the room was ajar, which was unusual. Mendoza knocked on the door and called Josephina's name, but there was no answer. (2RT 229-230.) He opened the door a little more, saw her bed covers bunched up on the bed, and then saw her body lying on the floor, in a pool of blood. (2RT 230.) He immediately called 911 and police and medical personnel responded. (2RT 228-230.)

Erika Gutierrez, who had hosted the party at her nearby home the night before, awoke to find appellant in her bathroom. He would not speak

to her. She saw a very large wound on his hand. (2RT 250.) He did not want to go to the hospital or to contact his father about his injury. (2RT 251.) Erika called Abraham. Erika asked Abraham for appellant's father's work number but he did not have it so Abraham drove to the restaurant where his father, Jose Luis, worked and told appellant's father he needed to take appellant to a doctor. (1RT 163-164.) Appellant's hand was bleeding. (2RT 178.) Erika drove appellant and his father to Los Robles Hospital. (2RT 177-179.) When Jose Luis asked appellant how he had cut his hand, appellant did not answer initially. (1RT 178.) Eventually, appellant said he had arrived at the house at about 3:00 a.m. and that there were about 15 people waiting for him. The people took him away and injured him. (2RT 254.) Later, when Jose Luis asked appellant about the death of Josephina, appellant said he did not kill her and that he was innocent. (1RT 182-184.)

Deputy William Therrien of the Simi Valley Sheriff's Department responded to the hospital and spoke with appellant. Through a translator, appellant told the deputy he had been attending a party in Moorpark where he was stabbed in the hand and the knee by an Hispanic male with a shaved head. There were MPLS gang members at the party. Appellant said he might be able to remember where the house was and gave a description of the person who stabbed him. (2RT 238-240.)

Crime Scene Investigator Rebecca McConnell of the Simi Valley Police Department processed the crime scene. (4RT 619.) McConnell walked into Josephina's bedroom and saw bloodstains everywhere, Josephina dead on the floor, lying between the bed and the bedroom, with a knife in her back. (4RT 621-622.) There was blood staining on just about every surface wall or ceiling and blood spatter and smears in the bathroom. (4RT 625.) Friction ridges were detected on the wall and floor of the bathroom, and were later compared to appellant's fingerprint card taken at booking. (4RT 626-627, 635-636.) The fingerprints found in Josephina's

bathroom came from the palm of appellant's left hand. (4RT 635.) In appellant's bedroom, bloody socks, shoes and jeans were found. (4RT 650-651.)

Appellant's car was towed by the Simi Valley Police Department. There were blood stains both outside and inside the car. Blood was found on the steering wheel and the center console. There was a heavily-bloodstained dress shirt found in the car. (4RT 656-660.)

Crime scene investigator Beth Dooley of the Simi Valley Police Department noticed that appellant had dried blood on his feet and between his toes, and there were several hairs and fibers adhering to the bottom of his feet. (2RT 287-288.) He also had dried blood on the tops of his ears and around his hairline, and on some jewelry he was wearing. (2RT 289-290.) Dooley collected buccal swabs for DNA purposes from appellant's inner cheek, and blood from appellant's body with cotton swabs. (2RT 290-291.) Dooley also examined Josephina's body for evidence at the medical examiner's office and collected blood from her inner and outer thighs for testing. (2RT 294-295, 297.) Dooley saw what appeared to be hand prints in the blood on Josephina's inner thighs, but they were not of a quality that allowed for hand print identification. (2RT 296-297.)

There was also a knife that was stuck in Josephina's back, which the medical examiner removed. (2RT 293, 299-301.) Josephina's clothing was also collected. (2RT 308.) A sexual assault nurse examiner collected evidence from appellant. (2RT 264-265.) When the examiner examined appellant's penis, she saw blood on the head of the penis. The blood was collected. (2RT 265.)

An autopsy was conducted on Josephina's body. (3RT 450.) There were 28 stab wounds in her body in the back, side, stomach, face, neck and fingers. (3RT 458-474.) The wounds on her fingers were consistent with defensive wounds. (3RT 475.) There were also fresh bruises on her face

and body. (3RT 477-481.) The cause of death was exsanguination, or hemorrhaging as a result of the multiple stab wounds. (3RT 481-482.)

A forensic scientist with the Ventura County Crime Lab analyzed swabs of blood collected from Josephina's bedroom, and found mixtures of DNA from at least two contributors. The major contributor DNA profile matched the DNA of appellant, and Josephina was included as a possible minor contributor for these swabs. The estimated frequency at which the major contributor DNA profile would be expected to occur in a population of randomly selected individuals in the Hispanic population ranged from 1 in 2.8 quintillion to 1 in 68 quintillion, (2RT 339-346.) The estimated frequency at which a randomly selected unrelated individual would be included as a minor contributor in the Hispanic population ranged from 1 in 8.1 million to 1 in 53 billion. (2RT 339-342.) The possible frequency from African-American and Caucasian populations was markedly lower. (2RT 359.) Wicks was able to exclude Abel Gutierrez, Jose Luis Gutierrez, Abraham Cordova, and Jose Luis Mendoza. (2RT 339-340.)

Wicks analyzed DNA from scrotum swabs that had been collected from appellant. Assuming a two-person DNA mixture with appellant as one of the contributors, Josephina was included as a possible second contributor. (2RT 347-348.) The estimated frequency at which a randomly selected unrelated individual would be included as a possible second contributor for the Hispanic population was 1 in 5.8 trillion. (2RT 348.) Wicks analyzed test swabs from the handle of the knife located in Josephina's body and found a mixture of DNA from at least one female and one male. (2RT 350-351.) A partial major contributor was deduced that was very similar to Josephina's DNA profile. The estimated frequency from the Hispanic population was 1 in 200 quadrillion. A partial minor contributor DNA profile and appellant was included as a possible

contributor. The estimated random frequency for a member of the Hispanic population was 1 in 4.3 billion. (2RT 351.)

Mixtures of non-sperm DNA were also found on swabs taken from Josephina's perianal area, her left inner thigh, her left lower buttocks and her upper right thigh. Josephina was a major contributor, and appellant could not be eliminated as a second contributor. The estimated frequency that a random unrelated person would be the second contributor ranged from 1 in 25 million to 1 in 55 million. (2RT 358-361.) Comparisons were also made with the DNA from Abel Gutierrez, Jose Luis Gutierrez, Abraham Cordova, and Jose Luis Mendoza. Although a sperm fraction found on Josephina's body included a match to her husband, Abel Gutierrez, all the others were excluded. (2RT 361-363.)

Wicks also found that the DNA profile from possible blood located on a wash cloth in Josephina's bathroom matched appellant's profile. (2RT 349.) Swabs were also taken from a bloody palm print near the light switch in the bathroom. (2RT 355.) A major male DNA profile was deduced from the mixture which matched appellant's profile. (2RT 356.) The estimated frequency at which the profile would be expected from a randomly selected unrelated individual for the Hispanic population was 1 in 68 quintillion. (2RT 357.)

A blood pattern analyst who viewed photographs of Josephina's body saw a bloodstain in the area of the intergluteal and upper back that might have been an imprint or a swipe, and it was possible that the shape was consistent with an erect male penis. (3RT 576-578.)

On March 18, 2008, appellant had surgery on his hand, and on March 19, he was medically cleared by his doctor and released. He was arrested and was transported to the Simi Valley Police Department. (2RT 376.)

Officer Lincoln Purcell of the Simi Valley Police Department advised appellant of his *Miranda* rights in Spanish. (2RT 385-386.) Appellant gave various versions of events. Initially, he claimed that after leaving the birthday party at about 4:00 a.m., he ingested crystal methamphetamine for about an hour with a group of men. (3CT 502, 509.) He claimed that later that morning, the same group of 10 to 15 men seized him, demanded money from him, and beat him and stabbed him. (3CT 542-546.) Appellant tried to defend himself and in the process, cut his hand on an assailant's knife. (3CT 546-548.) Appellant wrapped his hand in his shirt to stop the bleeding and walked home. (3CT 552-555.)

Officers told appellant that police had been surveilling the location at which appellant claimed he was abducted and stabbed, and there was no evidence of 10 or 15 men grabbing him. (3CT 580.) They also told him that his blood was found inside Josephina's room. (3CT 581-582.)

Appellant then offered a different version of events. He said he had left the party, arrived home at about 5:30 a.m., and knocked on Josephina's door. She was awake and they got into an argument. (3CT 607-609.) Josephina was saying ugly and humiliating things to him and began to attack him with a knife which she had in her room. (3CT 609-611.) He grabbed her hand. She cut him. (3CT 617.) Then she grabbed his hand and stabbed herself with it in the stomach to falsely incriminate him. (3CT 618-619.) He wanted to leave but she grabbed him so he could not leave. (3CT 619-620.) He pushed her so he could leave, and then she fell asleep and he left. (3CT 620.)

Officers told appellant that Josephina was stabbed multiple times in the back through her nightgown before she was stabbed in the stomach. (3CT 623.) Appellant told them she stabbed herself because she said she wanted to make sure he was buried in jail. (3CT 624.) After Josephina stabbed appellant, he did stab her in the back about three times. (3CT 635,

638, 666.) Appellant denied taking her clothes off. (3CT 639-640.) Josephina told him that she wanted to die and that she was going to accuse him of sexual abuse and that he had killed her. (3CT 641.) Appellant denied stabbing Josephina in the face and neck. (3CT 642.) After being told by officers that blood was found on his penis, appellant said she always told him she wanted something in him so someone in the house would catch them like that. (3CT 650.) She took off her own nightshirt, but asked him to remove her underpants and to undo her bra, and she took his pants down. (3CT 661, 667, 668, 670.) When she did this, he bent over and fell on top of her. (3CT 668-669, 672.) Josephina had been the one to separate her legs, and she was trying for him to do it to her, but he did not think his penis went into her vagina. (3CT 650-651.) By force, she wanted him to have sex. (3CT 674.) She had told him she was confused because she wanted to have something with him, but sometimes she was sorry that he was part of her family, and that she was sorry he was making her son an addict. (3CT 652-653.)

The parties stipulated that appellant's date of birth was February 2, 1991. (4RT 673.)

B. Defense Case

Appellant did not testify and presented no witnesses in his defense.

ARGUMENT

I. APPELLANT'S SENTENCE DOES NOT VIOLATE *MILLER V. ALABAMA*

Appellant contends the sentence of life in prison without parole for a murder he committed when he was 17 years old violated *Miller* because it was "the presumptive sentence" under state law and was done "without consideration of factors determined to be necessary" under *Miller*. (AOB 7-18.) As the Court of Appeal correctly found, however, appellant's claim

was not preserved for appellate consideration, and, moreover, fails on the merits.

A. Appellant Did Not Preserve His Constitutional Challenge

Appellant forfeited his right to challenge his prison sentence as cruel and unusual punishment by failing to object to the sentence on that ground in the trial court. (*People v. Russell* (2010) 187 Cal.App.4th 981, 993; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.)

B. The 2012 Amendment to Penal Code Section 1170 Provides for Meaningful Parole Review of Appellant's Sentence; His Sentence Is Thus No Longer Effectively Life Without the Possibility of Parole

Because of recent amendments to the Penal Code, appellant's sentence falls outside the *Miller* rule because it affords him the possibility of parole. (See *People v. Caballero* (2012) 55 Cal.4th 261, 269, fn. 5 [after holding that de facto life sentences for juvenile nonhomicide offenses are cruel and unusual punishment under *Graham*, this Court urges remedial legislation giving parole eligibility to juveniles serving such sentences].)

On September 30, 2012, Governor Brown signed an act that added subdivision (d)(2) to section 1170. Under subdivision (d)(2), which “shall have retroactive application” (§ 1170, subd. (d)(2)(J)), “[w]hen a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing” to a term of 25 years to life. (§ 1170, subd. (d)(2)(A)(i).) The defendant must “describ[e] his or her remorse and work towards rehabilitation” and state that one of the following four circumstances is true: (1) the defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law; (2) the defendant does not have juvenile

felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall; (3) the defendant committed the offense with at least one adult codefendant; and (4) the defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse. (§ 1170, subd. (d)(2)(B)).

If the defendant's statements are found true, "the court shall hold a hearing to consider whether to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced" (§ 1170, subd. (d)(2)(E).) The statute provides a nonexclusive list of factors to consider in deciding whether to recall and resentence. They include the four factors that can support the petition and four more: "Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress" (§ 1170, subd. (d)(2)(F)(iv)); "The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense (§ 1170, subd. (d)(2)(F)(v)); "The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime" (§ 1170, subd. (d)(2)(F)(vii)); and "The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor" (§ 1170, subd. (d)(2)(F)(viii)). The

court has discretion to recall and resentence and is to exercise that discretion “in consideration of the criteria in subparagraph (B).” (§ 1170, subd. (d)(2)(G); see also subd. (d)(2)(I) (providing “court may consider any other criteria that the court deems relevant to its decision”). Victims (or surviving family) have the right to participate in the hearings. (§ 1170, subd. (d)(2)(F) & (G).)

“If the sentence is not recalled, the defendant may submit another petition . . . when the defendant has been committed to the custody of the department for at least 20 years.” (§ 1170, subd. (d)(2)(H).) If that effort is unsuccessful, a defendant may file a third and final petition “after having served 24 years.” (*Ibid.*) These amendments “shall have retroactive application.” (§ 1170, subd. (d)(2)(J).)

Under these amendments, California’s sentencing scheme no longer truly prohibits the possibility of parole and no longer “mandate[s] that [the] juvenile die in prison.” (*Miller*, 132 S.Ct. at p. 2460.) Rather than limiting the sentencing court to a speculative and irrevocable determination about whether, “as the years go by and neurological development occurs, [the defendant’s] deficiencies will be reformed” (*id.* at p. 2465, internal quotation marks omitted)—a difficult task that requires the court to “distinguish[] 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’” (*id.* at p. 2469)—California offers all but a narrow category of 16- and 17-year-old special circumstance murderers not one, but three opportunities to have their sentences of life without the possibility of parole changed to a sentence of 25 years to life. They are repeatedly granted—not deprived of—“some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (*Ibid.*, quoting *Graham*, *supra*, 130 S.Ct. at p. 2030.)

Section 1170 now permits meaningful parole review of appellant's sentence. Appellant's sentence is thus no longer effectively a sentence of life without the possibility of parole. Therefore, appellant's current claim that his LWOP sentence is cruel and unusual punishment should be rejected.

Even assuming otherwise, as set forth below, the trial court properly exercised its discretion under section 190.5 in sentencing appellant.

C. Penal Code Section 190.5, Subdivision (b), Does Not Violate *Miller v. Alabama* Because It Gives Trial Courts Discretion to Impose a Lesser Term Based on Individualized Sentencing Considerations

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

Miller held that a sentencing court could sentence a juvenile murderer to LWOP on two conditions: First, it must consider the defendant's level of maturity and the nature of the crime. Second, the sentencing court must have the discretion to impose a lesser term. (*Miller, supra*, 132 S.Ct. at p. 2460.) It is clear that section 190.5, subdivision (b), meets those criteria. (See § 190.3; Cal. Rules of Court, rule 4.423.) Indeed, *Miller* cited section 190.5, subdivision (b), as an example of a permissible non-mandatory sentencing scheme. (*Id.* at p. 2471, fn. 10.) As discussed below, nothing in *Miller* can reasonably be said to cast doubt on the validity of section 190.5, subdivision (b). On the contrary, California's requirement of the

consideration of potential mitigation factors *exceeds* what is required by *Miller*.

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

Miller holds that courts cannot impose an LWOP term on a minor without first considering the defendant's personal circumstances and whether that warrants a reduced term:

Roper v. Simmons held that the Eighth Amendment bars capital punishment for children, and *Graham v. Florida* [2010] 560 U.S. ___, 130 S.Ct. 2011, concluded that the Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a nonhomicide offense. *Graham* further likened life without parole for juveniles to the death penalty, thereby evoking a second line of cases. In those decisions, this Court has required sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978 (plurality opinion). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life without parole for juveniles violates the Eighth Amendment.

(*Miller, supra*, 132 S.Ct. at p. 2458.)

Further, *Miller* struck down mandatory LWOP sentences for minors because “[s]uch a scheme prevents those meting out punishment from considering a juvenile’s ‘lessened culpability’ and greater ‘capacity for change,’ *Graham v. Florida*, 560 U.S. ___, ___, ___, 130 S.Ct. 2011, 2026-2027, 2029-2030, and run afoul of our cases’ requirement of individualized sentencing for defendants facing the most serious penalties.” (*Miller, supra*, 132 S.Ct. at p. 2460; see *id.* at p. 2472, fn. 11 [“We hold that the sentence violates the Eighth Amendment because, as we have exhaustively shown, it conflicts with the fundamental principles of *Roper*, *Graham*, and our individualized sentencing cases.”].)

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

Moreover, *Miller* prohibited mandatory LWOP terms for juveniles because they make no allowance for individualized sentencing. That cannot be said for section 190.5, subdivision (b). The LWOP presumption does not eliminate the need for the sentencing court to make an individualized sentencing determination. "Despite that statutory preference, section 190.5, subdivision (b) *requires* 'a proper exercise of discretion in choosing whether to grant leniency and impose the lesser penalty of 25 years to life for 16-year-old or 17-year-old special circumstance murderers. The choice whether to grant leniency of necessity involves an assessment of what, in logic, would mitigate or not mitigate the crime.'" (*Ybarra, supra*, 166 Cal.App.4th at p. 1089, quoting *Guinn, supra*, 28 Cal.App.4th at p. 1149; see *Wasman v. United States* (1984) 468 U.S. 559, 563 [104 S.Ct. 3217, 3220] ["It is now well established that a judge or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence. The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed."].)

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

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

It is well established that when a statute vests discretion in a court, that discretion is never unbridled. The discretion

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

(*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at p. 978.)

As both *Guinn* and *Ybarra* point out, section 190.5, subdivision (b), “requires” the exercise of discretion; and that discretion necessarily involves the consideration of mitigating circumstances. (*Ybarra*, 166 Cal.App.4th at p. 1089; *Guinn*, *supra*, 28 Cal.App.4th at p. 1149.)

Before imposing LWOP on juveniles pursuant to section 190.5, subdivision (b), sentencing courts must abide by both the Rules of Court

and the Penal Code. Rule 4.423 lists factors in mitigation that relate to the crime (subdivision (a)) and the defendant (subdivision (b)). The Courts of Appeal have established that these determinate sentencing factors apply to the discretion provided in section 190.5, subdivision (b): “The factors listed in [former] rules 421 [4.421] and 423 [4.423], implementing the determinate sentencing law, do not lose their logical relevance to the issue of mitigation merely because [this is not] a determinate sentencing matter.” (*Ybarra, supra*, 166 Cal.App.4th at p. 1089, quoting *Guinn, supra*, 28 Cal.App.4th at p. 1149, 33 Cal.Rptr.2d 791; Rule 4.409 [“Relevant criteria enumerated in these rules must be considered by the sentencing judge”]; Cal. Rules of Court, rule 4.410 [“The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and *the facts and circumstances of the case.*” (Italics added.)].)

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

In particular, *Miller* emphasized, “‘An offender’s age . . . is relevant to the Eighth Amendment,’ and so ‘criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.’” (*Miller, supra*, 132 S.Ct. at p. 2466.) Indeed, *Miller* notes that youth is the “most fundamental” consideration “in determining the appropriateness of a lifetime of incarceration without the possibility of parole.” (*Id.* at p. 2465.)

But the mandatory penalty schemes at issue here prevent the sentence from taking account of these central considerations.” (*Id.* at p. 2466.) However, section 190.5, subdivision (b), already gives sentencing courts the discretion to take youth into consideration. (See *Guinn, supra*, 28 Cal.App.4th at p. 1142 [“a court might grant leniency in some cases, in recognition that some youthful special-circumstance murderers might warrant more lenient treatment”].) Moreover, section 190.3, factor (i), specifically lists “[t]he age of the defendant at the time of the crime” as a relevant consideration. (*Miller, supra*, 132 S.Ct. at p. 2467 [“we insisted in these [previous] rulings that a sentencer have the ability to consider the ‘mitigating qualities of youth.’”].)

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

It is also worth noting that *Miller* was concerned with “the great difficulty . . . of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’” (*Miller, supra*, 132 S.Ct. at p. 2469.) The juveniles in *Miller* were 14 years of age. However, California does not make LWOP available for juveniles who are under 16 years of age. (§ 190.5, subd. (b).) Moreover, it seems evident that the difficulty in distinguishing between immaturity and “irreparable corruption” diminishes as the juvenile approaches adulthood. Surely, there is a far greater difference between 14- and 18-year olds, than between 17- and 18-year-olds.

As for appellant, the gravity of his offense makes clear he is amongst true rare juvenile offenders whose crimes reflect "irreparable corruption". During his violent sexual assault, appellant repeatedly stabbed the victim. He expressed no remorse and told the police, days after the murder, that the victim had sexually assaulted him. After the interview, he accompanied the officers to the house and calmly walked them through the blood-stained crime scene.

Finally, *Miller* makes it clear that it is sufficient for trial courts to have "the opportunity" to consider mitigating factors. (*Miller, supra*, 132 S.Ct. at p. at p. 2475 [*"Graham, Roper, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."*].) As discussed above, California's Penal Code, Rules of Court, and case law all make it clear that trial courts must go beyond this and are *required* to consider relevant mitigating factors before determining whether to impose LWOP or 25 years to life pursuant to section 190.5, subdivision (b).

In sum, California's sentencing scheme affords a degree of individualized sentencing discretion that was completely absent from the mandatory LWOP terms struck down in *Miller*.

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

The *Miller* opinion begins, "The two 14-year-old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. *In neither case did the sentencing authority have any discretion to impose a different punishment.*" (*Miller, supra*, 132 S.Ct. at p. at p. 2460, italics added.) That is categorically not the case in California.

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

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

In California, trial courts are *required* to decide *which* term to impose. And that consideration must be based on standard sentencing factors. (See *People v. Superior Court (Alvarez), supra*, 14 Cal.4th at p. 978 [even when a sentencing statute grants “broad generic” discretion, “a determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest ‘exceeds the bounds of reason.’”].) The trial court here did just that;

The trial court, in sentencing appellant, stated it was concerned throughout the trial about the defendant's age and the age of which he committed this horrific crime. [¶] And I have considered all of the legal options that are limited for the Court with this conviction, . . . and there are a number of things about the crime itself that in my view warrants life without the possibility of parole, notwithstanding the defendant's age. [¶] First and foremost is really just the true horror that was involved and the amount of violence that was inflicted on Josefina is really inexplicable. And there isn't, other than the rape special circumstance, there isn't any rational [] explanation as to how the defendant could have found himself in that position. [¶] He has devastated this family and her children and her husband, and there is really no amount of time that could be imposed as punishment that would repay the damage he has caused, not just to her inner circle but to the community as well and the community of her family. [¶] . . . [¶] So I thought -- I have thought long and hard about what punishment is appropriate and I am absolutely convinced at this stage of the proceedings that life without the possibility of parole is the only thing that the Court can do that could redress the amount of violence that was inflicted in this case.

The trial court's consideration of proposed mitigation and a sentence other than LWOP clearly satisfied *Miller's* requirement that sentencing courts have the discretion to impose a term below LWOP when that is appropriate based on various factors, including the defendant's age, immaturity, and the nature of the crime. There can be no dispute that the particular crime involved in this appeal was heinous. The murder resulted from a vicious and unprovoked attack on a defenseless woman. Her brutal rape and murder "are extremely serious crimes and they deserve severe punishment." (*People v. Szadziwics* (2008) 161 Cal.App.4th 823, 846.)

At bottom, even though California has expressed a preference for the maximum penalty for juveniles, "[t]he choice whether to grant leniency of necessity involves an assessment of what, in logic, would mitigate or not mitigate the crime," as informed by California Rules of Court, Rule 4.421

(aggravating circumstances) and Rule 4.423 (mitigating circumstances). Unlike the statutes in *Miller*, section 190.5, subdivision (b), does not “preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.” (*Miller, supra*, 132 S.Ct. at p. 2467.) Therefore, California’s sentencing scheme is not mandatory and does not violate *Miller*.

In any event, because the sentencing court considered Moffett’s age, did not find any other mitigating circumstances, and found numerous factors in aggravation, it would have chosen the upper penalty even if there was no presumption. Accordingly, this Court should reinstate the LWOP sentence because no purpose would be served by ordering the trial court to resentence appellant. (See *Chapman v. California* (1967) 386 U.S. 18, 24-25.)

II. APPELLANT’S OTHER CHALLENGES TO THE CONSTITUTIONALITY OF HIS SENTENCE ARE 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, appellant contends that his LWOP term categorically violates the Eighth Amendment (AOB 25-35), and that it is disproportionate in this particular case under the Eighth Amendment and article 1, section 17 of the California Constitution (AOB 18-25). This Court should reject these distinct claims 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.”].)

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 issues involving a facial challenge and a disproportionality challenge would be inappropriate. Accordingly, this Court should decline to address appellant’s additional claim on the merits.³ (See *People v. Perez, supra*, 35 Cal.4th at p. 1228; Cal. Rules of Court, rule 8.520(b)(3).)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of Court of Appeal should be affirmed.

Dated: June 10, 2013

Respectfully submitted,

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³ 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).)

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 7,184 words.

Dated: June 10, 2013

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, appearing to read "David F. Glassman", with a long horizontal flourish extending to the right.

DAVID F. GLASSMAN
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *The People of the State of California v. Luis Angel Gutierrez*

Case No.: **S206365**

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.

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On July 11, 2013, I served the attached **ANSWER BRIEF ON THE MERITS** 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 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, 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 July 11, 2013, at Los Angeles, California.

J.R. Familo
Declarant


Signature