S206365

IN THE SUPREME COURT

THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent

vs.

LUIS ANGEL GUTIERREZ

Defendant and Appellant

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

The Honorable Patricia M. Murphy, Judge Presiding

REPLY BRIEF ON THE MERITS

JEAN MATULIS, SBN 139615
Attorney at Law
P.O. Box 1237
Cambria, California, 93428
(805) 927-1990
matulislaw@gmail.com
Attorney for Appellant
Luis Angel Gutierrez

SUPREME COURT
FILED
AUG 23 2013
Frank A. McGuire Clerk
Deputy

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 2

I. APPELLANT'S LIFE WITHOUT PAROLE SENTENCE VIOLATES THE EIGHTH AMENDMENT 2

A. Appellant's Constitutional Claims Should be Addressed on The Merits 2

B. Amendments to Penal Code Section 1170, Subdivision (d) Do Not Diminish Appellant's Right to be Properly Sentenced under *Miller* 3

C. Penal Code Section 190.5 Violates *Miller* Because it Does Not Require Consideration of Factors Deemed Necessary by *Miller* Prior to Imposing an LWOP Sentence 10

D. The Presumptive Life Without Parole Sentence Imposed Under Penal Code Section 190.5 Violates the Eighth Amendment 13

II. THE SCOPE OF REVIEW DOES NOT PRECLUDE CONSIDERATION OF WHETHER APPELLANT'S LWOP TERM CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND WHETHER A CATEGORICAL BAN OF SUCH A SENTENCE IS NECESSARY 18

CONCLUSION 21

CERTIFICATE OF WORD COUNT 21

TABLE OF AUTHORITIES

Federal Cases **Page(s):**

Eddings v. Oklahoma (1982)
455 U.S. 104 12

Gagnon v. Scarpelli (1973)
411 U.S. 778 8

Gardner v. Florida (1977)
430 U.S. 349 10

Graham v. Florida (2010)
560 U.S. ___ [130 S.Ct. 2011] 8, 19

Miller v. Alabama (2012)
567 U.S. ___ [183 L.Ed. 2d 407, 418, 421; 132 S.Ct. 2455]
. . . . 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

Miranda v. Arizona (1966)
384 U.S. 436 20

Roper v. Simmons (2005)
543 U.S. 551 . . . . 6, 10, 19

Texas v. Cobb (2001)
532 U.S. 162 15

State Cases

Arredondo v. State (Tex. June 26, 2013)
___ S.W.3d ___, 2013 WL 3198439 18

Banks v. People (Col. June 24, 2013)
2013 WL 3168752 16

Daugerhty v. State of Florida (2012)
96 So. 3d 1076 16

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

James H. v. Superior Court (1978)
77 Cal.App.3d 169 7

Timothy J. v. Superior Court (2007)
150 Cal.App.4th 847 7

Parker v. State (Miss.2013)
___ So.3d ___, ___, 2013 WL 2436630 17

Bear Cloud v. State (Wyo.2013)
294 P.3d 36 17

People v. Avila (2006)
38 Cal.4th 491 15

People v. Avila (2009)
46 Cal.4th 680 9

People v. Blackwell (2011)
202 Cal.App.4th 144, judg. vacated and cause remanded sub nom.*Blackwell v. California* (2013) 568 U.S.__ [184 L. Ed. 2d 646, 133 S. Ct. 837] . 15, 16

People v. Caballero (2012)
555 Cal. 4th 262 18

People v. Guinn (1994)
28 Cal. App. 4th 1130 . . . . 11, 13, 15, 18

People v. Hamlin (2009)
170 Cal. App. 4th 1412 6

People v. Moffett (2012)
148 Cal.Rptr.3d 47, 55, review granted and opn. superseded by *People v. Moffett* (Jan. 3, 2013, S206771) 150 Cal.Rptr.3d 567, 290 P.3d 1171) . . . 20

People v. Russell (2010)
187 Cal. App. 4th 981 2

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

People v. Ybarra (2008)
166 Cal. App. 4th 1069 . . . . 11, 15

State v. Hart (Mo. July 30, 2013)
___ S.W. ___ (2103 WL 3914430 9

State v. Ragland (Iowa, Aug. 16, 2013)
___ N.W. 2d ___ 2013 WL 4309970 17

Rules, Regulations and Statutes

California Code of Regulations

15 CCR § 3375.2 8
15 CCR § 3375.3 8
15 CCR § 3377.1 8

Penal Code Sections

190.05 14
190.3 14
190.5 . . . . 11, 13, 14, 15, 16, 18, 19
1170 . . . . 3, 4, 5, 6, 7, 8

Rules of Court

Rule 4.420 12
Rule 4.421 . . . . 11, 12
Rule 4.423 . . . . 11, 12

Constitutional Authority

United States Constitution

U.S. Const. Amend VI 10
U.S. Const. Amend VIII 2, 10, 13, 18, 19
U.S. Const. Amend XIV 10

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	)	No. S206365 Court of Appeal No. B227606 Ventura County Superior Court No. 2008011529

APPEAL FROM THE JUDGMENT OF THE
CALIFORNIA SUPERIOR COURT, VENTURA COUNTY

The Honorable Patricia M. Murphy, Judge Presiding

APPELLANTS REPLY BRIEF ON THE MERITS

Appellant's Reply Brief on the merits is limited to the rebuttal of certain points in the Respondent's Brief. This limitation does not constitute a waiver of any issues raised in Appellant's Opening Brief of the Merits. Appellant submits that the points in Respondent's Brief to which no reply has been made herein have been full covered in Appellant's Opening Brief and that only those points requiring additional comment will be addressed in this Reply Brief.

ARGUMENT

I. APPELLANT'S LIFE WITHOUT PAROLE SENTENCE VIOLATES THE EIGHTH AMENDMENT

In *Miller v. Alabama* (2012) 567 U.S. ___ [183 L.Ed. 2d 407, 418, 421; 132 S.Ct. 2455], the United States Supreme Court recognized a life without parole sentence as the "ultimate penalty for juveniles as akin to the death penalty" and therefore "treated it similarly to that most severe punishment." The High Court concluded not only that mandatory life without parole sentences violate the Eighth Amendment, but required that a sentencing court follow a certain process before imposing the sentence, taking into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id* at. 424, 426.) Here the necessary process was not followed and the life without parole sentence is invalid.

A. Appellant's Constitutional Claims Should be Addressed on The Merits

Citing *People v. Russell* (2010) 187 Cal. App. 4th 981, 993, respondent contends that appellant's challenge to his sentence as cruel and unusual punishment is forfeited due to failure to object on that ground in the trial court. (Answer Brief on the Merits ("ABOM") at p. 11.) *Russell* undermines respondent's assertion. In *Russell*, the Court of Appeal stated that the defendant had forfeited the issue of cruel and unusual punishment, because the argument raised on appeal was not that the sentence for first degree or felony murder was unconstitutional, but that the sentence was cruel and unusual because it was a "technical, tenuous at best" application of the law and that the defendant suffered from various impairments. (*Id* at. 993.) Here, appellant *does* challenge the constitutionality of the law under

which he was sentenced, and did so in the appeal. Also, in *Russell*, the court still addressed the merits of the claim "in the interest of judicial economy to prevent the inevitable ineffective-assistance-of-counsel claim." (*Id.* at 993.) Even if appellant's claims were deemed waived, this Court can and should address the issues on their merits. At the time of appellant's sentencing on August 23, 2010, no court had recognized that LWOP sentences for juveniles in *homicide* cases may be unconstitutional. The lack of objection at sentencing based on the Eighth Amendment is no bar to this Court's review of this issue.

B. Amendments to Penal Code Section 1170, Subdivision (d) Do Not Diminish Appellant's Right to be Properly Sentenced under *Miller*

Respondent contends that appellant's sentence does not violate *Miller* and is no longer "effectively" life without the possibility of parole because of recent amendments to Penal Code section 1170 passed pursuant to S.B. 9.[1] Respondent is mistaken. Appellant is currently serving a life without parole sentence. The provisions of S.B. 9 were never designed to adjudicate constitutional challenges to an existing life without parole sentence, are not guaranteed to remain in effect by the time appellant might attempt to use them, are purely discretionary, and are based on upon factors other than those required by *Miller*. Therefore, S.B. 9 does not diminish the necessity of this Court to recognize that the presumptive LWOP sentence imposed under section 190.5 violates the Eighth Amendment.

---

[1]All statutory references are to the Penal Code unless otherwise indicated. On September 30, 2012, Governor Brown signed into law Senate Bill 9 (S.B. 9) pertaining to a LWOP sentences of juveniles, which is scheduled to go into effect on January 1, 2014. (See section 1170 (added by Stats. 2012, ch. 828.)

Under S.B. 9, "[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." (Section 1170, subd. (d)(2)(A)(I).) The person must assert a series of prerequisites in a petition filed with the sentencing court pursuant to section 1170, subdivision (d)(2)(B)), and under section 1170, subdivision (d)(2)(E),

> If the court finds by a preponderance of the evidence that the statements in the petition are 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, provided that the new sentence, if any, is not greater than the initial sentence."[2] If denied, the

---

[2]Section 1170, subdivision (d)(2)(F) provides:

The factors that the court may consider when determining whether to recall and resentence include, but are not limited to, the following:

(I) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) 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.

(iii) The defendant committed the offense with at least one adult codefendant.

(iv) 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.

(v) 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.

(vi) 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

person may re-apply after completion of 20 years, and again and finally, after completion of 24 years. (See section 1170, subd. (d)(2)(H).

Respondent characterizes the requirements under *Miller* as "limiting the sentencing court to a speculative and irrevokable determination about whether, 'as the years go by and neurological development occurs, [the defendant's] deficiencies will be reformed'" and contends that section 1170, subdivision (d)(2) now gives three opportunities in the future for inmates to have their life without parole sentences changed to sentences of 25 years to life. (ABOM) at p. 13.) However, the amendments do not remediate the constitutional deficit of section 190.5 as interpreted by *Guinn* and applied by the sentencing court. Under *Miller*, a sentencer must considered the required factors "*before* concluding that life without any possibility of parole [is] the appropriate penalty." (*Id.* at 424 (emphasis added).) The options contained in S.B. 9 do not go into effect until 2014, and may not be exercised by an individual defendant until after completion of a minimum of fifteen years of the sentence. (§1170, subd. (d)(2)(A)(1).) By placing a burden on the juvenile offender at some point in the future to maybe establish new criteria by a preponderance of the evidence, section

---

showing evidence of remorse.

(vii) 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.

(viii) 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.

Additionally, section 1170, subdivision (d)(2)(I) provides:
"In addition to the criteria in subparagraph (F), the court may consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria."

1170, subdivision (d)(2) fails to remedy the improper and presumptively imposed LWOP sentence.

Under S.B. 9, a trial court has discretion whether or not to recall the original sentence and conduct a new resentencing. (§ 1170, subd. (d)(2)(G).) However, constitutional claims are not a matter of discretion. "[W]hether defendant's sentence amounted to cruel or unusual punishment is a question of law [citation]," which a reviewing court determines "on de novo review." (*People v. Hamlin* (2009) 170 Cal. App. 4th 1412, 1474.) The resentencing component of the new procedure is constitutionally defective for the same reason as the old procedure: Even if a court finds an inmate eligible for potential resentencing and ultimately decides to recall the sentence, it will then conduct a new sentencing hearing (§1170, subdivision (d)(2)(G)) governed by the same inadequate constitutionally infirm LWOP approach that fails under *Miller* standards. Thus, even if appellant were at some point in the future, to obtain a recall hearing, the new section 1170, subdivision (d)(2) procedure would not and could not resolve his constitutional claims because they are linked to the very statute he is challenging, namely, section 190.5, subdivision (b).

Additionally, the criteria for obtaining a discretionary recall proceeding (the "truth" of the inmate's showing of "remorse and work toward rehabilitation") (§ 1170, subd. (d)(2)(D)-(E)) and for the decision to resentence (§ 1170, subd. (d)(2)(F)) are not the same as the specific psychological factors and characteristics of youth that *Miller* requires.[3]

---

[3] These hallmark features include a "lack of maturity and an underdeveloped sense of responsibility" leading to "recklessness, impulsivity, and heedless risk-taking." (*Miller v. Alabama, supra*, 567 U.S. ___, 183 L. Ed. 2d 407, 418, citing *Roper v. Simmons* (2005) 543 U.S. 551, 569.) Also, juveniles are "more vulnerable . . . to negative influences and

Factors under section 1170 include an inmates *current* "family ties or connections" (subdivision (d)(2)(F)(vii)) which do not relate to the juvenile's immaturity and limitations at the time of the offense. Section 1170, subdivision (d)(2)(F)(v) provides "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." This factor sets too high a burden to satisfy *Miller* because it appears to require that the inmate suffered from a mental illness or disability instead of the immaturity and inability to ponder consequences as inherent though transitory "mitigating qualities of youth." (*Miller, supra*, 132 S.Ct. at 2467-2469.) In other contexts, California case law supports recognition of the distinction between mental disabilities and the limited capabilities uniquely related to youth. (See e.g., *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 857-860 [recognizing that a minor need not have a mental or developmental disability to be found incompetent to stand trial]; *James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 174 [finding a minor has the right to a mental competency hearing before a fitness hearing under Welfare and Institutions Code section 707, subdivision (b)].) Under *Miller*, such considerations must be adequately addressed *prior* to sentencing.

Section 1170, subdivision (d)(2)(F)(vi) provides, "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

---

outside pressures" and have limited control over their own environment, and a juvenile's character is "not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" (*Ibid.*)

been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse." The possibility of rehabilitation is only one and the last enumerated sentencing factor that *Miller, supra,* ___ U.S. ___, 132 S. Ct. at 2468, held should be considered at the initial sentencing. Prospectively, individuals who have already been given LWOP sentences do not have access to the same level of programming and opportunities as other inmates. (See 15 CCR § 3375.2 (a)(6) [an inmate serving an LWOP sentence generally unable to housed in a facility level lower than Level III]; §§3375.3(a)(3)(A); 3375.1(a); 3377.1(a) [classification scores of LWOP inmates automatically results in restricted housing and related programing options].) Thus, an inmate attempting to demonstrate rehabilitation with limited access to meaningful rehabilitation opportunities is like Sisyphus attempting vainly to push a boulder up a hill.[4] In other words, a person could find himself unable to satisfy the burden under S.B. 9, but still have been an improper subject for a life without parole sentence had the *Miller* requirements been properly applied at the time of sentencing.

There are additional reasons that the amendments in S.B. 9 are no substitute for a proper sentencing in the first instance under *Miller*. S.B. 9 does not provide the right to counsel, where a person has the right to counsel at an initial sentencing proceeding. (See *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 781, 93 S.Ct. 1756, 1759, 36 L.Ed.2d 656.) Also, S.B. 9 places the burden on the inmate (§1170. subd. (d)(2)(E)), and

---

[4]In *Graham v. Florida* (2010) 560 U.S. ___ [130 S.Ct. 2011, 2032-2033], the High Court observed the unique severity of LWOP for juvenile offenders capable of change, and recognized the "perverse consequence" that prisons often limit life-development programs for no-parole offenders.

sentencing is generally not susceptible to a burden of proof quantification. (*People v. Avila* (2009) 46 Cal.4th 680, 724.) If any burden is placed in post-*Miller* proceedings, it should be shouldered by the prosecution as recently determined by the Supreme Court of Missouri in the case of *State v. Hart* (Mo. July 30, 2013) ___ S.W. ___ (2103 WL 3914430, *1) [sentencer conducting *Miller* assessment must be persuaded beyond a reasonable doubt that life without parole is just and appropriate under all the circumstances].)

Notwithstanding respondent's claims to the contrary, if an inmate is sentenced as LWOP and classified as an "LWOP" the person is, in fact, LWOP. The notion that prisoner sentenced to life without parole may, at some point in the future no longer be sentenced to life without parole does not undermine the unconstitutionality of an improperly imposed LWOP sentence any more that the possibility that a person could one day be pardoned. (See 15 CCR § 2815, 2815.) There is no guarantee that the new statute will not be amended or even repealed before appellant would ever have an opportunity to seek relief under its provisions. Even assuming that section 1170, subdivision (d)(2) remains in effect by the time appellant might be eligible to file a petition for a possible hearing on a possible recall of his sentence, the existence of these provisions does not make appellant's current sentence anything other than an improperly imposed LWOP sentence. There is also no evidence that the Legislature enacted S.B. 9 in response to *Miller v. Alabama, supra,* 567 U.S. ___ [183 L.Ed. 2d 407, 418]. The bill was introduced on December 6, 2010, and *Miller* was not

decided until June 25, 2012.[5] Under the principles established in *Miller*, appellant has the right to remand immediately to ensure that he receives a proper sentence based on the correct presumptions and required factors, and with the guarantee of effective assistance of counsel at sentencing to which he is entitled. (*Gardner v. Florida* (1977) 430 U.S. 349, 358, U.S. Const. Amend. VI, VIII, XIV.) Remand is therefore necessary.

C. Penal Code Section 190.5 Violates *Miller* Because it Does Not Require Consideration of Factors Deemed Necessary by *Miller* Prior to Imposing an LWOP Sentence

In *Miller v. Alabama, supra*, 567 U.S. ___, 183 L. Ed. 2d 407, 426, the High Court mandated that a sentencing court "follow a certain process -- considering an offender's youth and attendant characteristics" before imposing a life without parole sentence. To this end, the Court established prerequisites that a sentencing court take into account: "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.[6] (*Id.* at 424) Section 190.5 does not require

---

[5]See: Sen. Com. on Public Safety, Analysis of Sen. Bill No. 9 (2011-2012 Reg. Sess.) April 4, 2011; http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_9_cfa_20110404_112049_sen_comm.html

[6]As previously discussed, the *Miller* court outlined the following factors: First, juveniles have a "lack of maturity and an underdeveloped sense of responsibility" leading to "recklessness, impulsivity, and heedless risk-taking." (*Miller v. Alabama, supra*, 567 U.S. ___, 183 L. Ed. 2d 407, 418, citing *Roper v. Simmons, supra,* 543 U.S. 551, 569.) Second, juveniles are "more vulnerable . . . to negative influences and outside pressures" and have limited control over their own environment. (*Ibid.*) Third, a juvenile's character is "not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" (*Ibid.*) The Court further held that a sentencer must "examine *all* these circumstances *before* concluding that life without any possibility of parole [is] the appropriate penalty." (*Id.* at 424 (emphasis

consideration of the specified factors, in contravention of *Miller*.

Respondent contends that LWOP sentencing under section 190.5 is sufficient under *Miller* because the LWOP presumption does not eliminate the need for the sentencing court to make an individual sentencing determination. (RB at p. 16.) Respondent argues that 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" including factors in mitigation under rule 4.423. (ABOM at pp. 17-18, citing *People v. Guinn* (1994) 28 Cal. App. 4th 1130, 1149, and *People v. Ybarra* (2008) 166 Cal. App. 4th 1069, 1089.)

Respondent misreads *Guinn* and *Ybarra*. In *Guinn,* the defendant contended on appeal that the trial court had improperly relied on determinate sentencing mitigating and aggravating circumstances. (*People v. Guinn, supra,* 28 Cal. App. 4th 1130, 1149.) The court rejected the contention stating that the factors listed in rules [4.]421 and [4.]423 "do not lose their logical relevance to the issues of mitigation merely because this is not a determinate sentencing matter." The court noted that section 190.3 provide for a number of factors which "can be considered" in selecting a penalty, which by extension would include determinate sentencing criteria as proper criteria in evaluating whether sentencing leniency should be granted. (*Ibid.*) *Ybarra* quoted *Guinn* for the same proposition. (*Ybarra, supra,* 166 Cal. App. 4th 1069, 1089.) Thus, although *Guinn* and *Ybarra* determined that sentencing courts "can" consider these sentencing factors, they did not hold that such consideration was required. (*Ibid.*)

---

added).)

Neither section 190.3, nor rule 4.423 require that the sentencing court address the specific factors articulated in *Miller*. As explained in the opening brief, as a preface to rule 4.423, rule 4.420 (b) states that in exercising discretion, the sentencer "may" consider circumstances in mitigation, but does not, on its face, require it. In the instant case, the probation report did not address any of the factors in rule 4.423, stating "[a]s the defendant is subject to the imposition of an indeterminate prison sentence, Judicial Council Rules 4.421 and 4.423 will not be addressed." (See Report of Probation Officer (RPO) at p. 18.) The trial court relied on the probation report in sentencing and did not refer to any factors in rule 4.423. (4 RT 862, 873-874.) Even if the court had considered the factors in rule 4.423, none of them require application of the specific *Miller* factors. Respondent argues that section 190.5, subdivision (b) already gives sentencing courts the discretion to take youth into consideration. (RB at p. 19.) However, it, too, does not require it. Furthermore, under *Miller*, it is not enough that chronological age itself be considered. The Supreme Court determined that "'[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, *so must the background and mental and emotional development of a youthful defendant be duly considered*' in assessing his culpability." (*Miller v. Alabama, supra*, 576 U.S. ___, 183 L. Ed. 2d 407, 422, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 116, 102 S. Ct. 869, 71 L.Ed. 2d 1 (emphasis added).)

Similarly, section 190.3 does not require that the court address the defendant's age, background, mental and emotional development as a primary consideration, or recognize specifically how juveniles are different and how those differences counsel against irrevocably sentencing appellant to a lifetime in prison. (*Miller v. Alabama, supra*, 576 U.S. ___, 183 L. Ed.

2d 407, 424.) Nor does it require the sentencing court to address as mitigating factors the "lack of maturity and an underdeveloped sense of responsibility," are more vulnerable to "negative influences and outside pressures and have limited control over their own environment," are subject to "recklessness, impulsivity, and heedless risk-taking," and evidence that a juvenile's character is not as "well formed" as an adult's, or that his traits are "less fixed." (*Id.* at 418.)

Respondent contends that *Miller* "makes clear that it is sufficient for trial courts to have 'the opportunity' to consider mitigating factors." (RB at p. 20.) Respondent is not correct. Finding it unnecessary to resolve the issue as to whether a categorical ban of LWOP in juvenile cases was required, the *Miller* court concluded, "Although we no not foreclose a sentencer's ability to make that judgment in homicide cases, *we require it* to take into account how children are different, and how these differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller v. Alabama, supra*, 576 U.S. ___, 183 L. Ed. 2d 407, 424 (emphasis added).) Thus, it is not merely "sufficient" for trial courts to have "the opportunity" to consider mitigating factors. Just as the Alabama statute was unconstitutional because it did not permit the sentencing court to take into account the necessary factors, our statute is unconstitutional because it does not "require it" to take into account the necessary factors. (*Ibid.*)

D. The Presumptive Life Without Parole Sentence Imposed Under Penal Code Section 190.5 Violates the Eighth Amendment

In *People v. Guinn, supra*, 28 Cal. App. 4th 1130, 1144-1145, the court held that section 190.5 evidences a "preference for the LWOP penalty," and declined to extend the procedural protections of sections

190.3 and 190.05 to juvenile offenders facing life without parole sentences under section 190.5.[7] The *Guinn* court distinguished these statutes from section 190.5 stating they prescribe procedures for submitting the selection of sentence between the two *equal* choices to a trier of fact, and in contrast, section 190.5 "provides a presumptive penalty" and "does not involve two equal penalty choices, neither of which is preferred." (*Id.* at 1145.) *Guinn* further determined that because life without parole is the presumptive sentence under section 190.5, "the court's discretion is comcomitantly circumscribed to that extent." (*Id.* at 1142.)

Respondent is untroubled by the *Guinn* approach and contends that *Miller*'s bar on mandatory LWOP terms for minors does not imply that lesser terms must be considered equally by sentencing courts. (RB at p. 21.) However, this is contrary to *Miller* which implicitly held a presumption against imposition of life without parole should apply when it stated that such a sentence imposed on youth should be uncommon and rare, and mandates that a sentencer "follow a certain process . . . *before* imposing a particular penalty, and requires the sentencer to "examine *all* these circumstances *before* concluding that life without any possibility of parole [is] the appropriate penalty." (*Miller v. Alabama, supra*, 567 U.S. ___, 183 L. Ed. 2d 407, 424, 426 (emphasis added).)

Based on a footnote in *Miller*, Respondent asserts that *Miller* cited section 190.5, subdivision (b), as "an example of a permissible non-mandatory sentencing scheme." (RB at p. 14, *Miller, supra,* 567 ___, 132

---

[7]Section 190.3 and section 190.05 provide the right to a jury trial and other protections in cases that involve a choice between death or LWOP in a capitol murder case (§190.3), and a choice between LWOP or 15 years to life in case of a second degree murder with a prior prison term for murder (190.05).

Ct. 2455, 2472, fn. 10.) Respondent overstates the footnote. In footnote 10, *Miller* listed fifteen jurisdictions that make life without parole discretionary for juveniles including California, but made no comment as whether section 190.5 was a "permissible non-mandatory sentencing scheme." The footnote does not address California precedent in *Guinn* and *Ybarra*, that has "circumscribed" the necessary discretion by placing on sentencing courts the requirement that life without parole sentences be presumed. The High Court did not address this presumption and any inference that can be drawn from footnote 10 does not dispose of the issue here, because cases are not authority for propositions not considered. (*People v. Avila* (2006) 38 Cal.4th 491, 566; see also *Texas v. Cobb* (2001) 532 U.S. 162, 169 [121 S.Ct. 1335, 149 L.Ed.2d 321] ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue."].)

It is significant that prior to *Miller*, the case of *People v. Blackwell* (2011) 202 Cal.App.4th 144, judg. vacated and cause remanded sub nom. *Blackwell v. California* (2013) 568 U.S. ___ [184 L. Ed. 2d 646, 133 S. Ct. 837], was another California authority that followed the *Guinn* and *Ybarra* line of reasoning that under section 190.5, life without parole was the presumptive sentence. However, on January 7, 2013, the United States Supreme Court granted *certioriari*, vacated, and remanded *Blackwell* back to the Court of Appeal in California for further consideration in light of *Miller*.[8] Remand for further proceedings would not have been necessary

---

[8]The order granting certiorari stated: "Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari granted. Judgment vacated, and case remanded to the Court of Appeal of California, First Appellate District, for further consideration in light of *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d

and likely had the Supreme Court in *Miller* had actually made a substantive determination that section 190.5 constituted a "permissible non-mandatory sentencing scheme" as respondent suggests. (RB at p. 14.)

Other states have declined to take such a narrow view of the Miller holding. In *Daugerhty v. State of Florida* (2012) 96 So. 3d 1076, 1079, the Court of Appeal reversed and remanded the case of a juvenile sentenced to life without parole to the trial court for further proceedings in light of *Miller*. Unlike the juveniles in *Miller*, the defendant in *Dougherty* had not been sentenced to a statutorily mandated sentence of life without parole, but rather, the trial judge had the discretion to impose a different punishment. (*Ibid.*) The sentencing record contained "extensive testimony regarding appellant's difficult childhood and other factors that may have lessened his culpability" and the judge referenced hearing about the "horrible and unfortunate upbringing" of the defendant prior to imposing sentence. (*Id.* at 1080.) Nonetheless, the reviewing court decided to "remand this case to the trial court to conduct further sentencing proceedings and expressly consider whether any of the numerous 'distinctive attributes of youth' referenced in *Miller* apply in this case so as to diminish the 'penological justifications' for imposing a life-without-parole sentence upon appellant." (*Ibid.*)

In *Banks v. People* (Col. June 24, 2013) 2013 WL 3168752, the Supreme Court of Colorado granted *certiorari* in a juvenile case on the issue of "[w]hether, after *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Eighth Amendment to the U.S. Constitution is violated by the imposition on a juvenile of a sentence of mandatory life sentence *with the potential of*

---

407 (2012)." (*Blackwell v. California* (January 7, 2013.) 33 S. Ct. 837; 184 L. Ed. 2d 646; 2013 U.S. LEXIS 401; 81 U.S.L.W. 3364.)

parole after forty years." (Emphasis added.)

In *State v. Ragland* (Iowa, Aug. 16, 2013) ___ N.W. 2d ___ 2013 WL 4309970, the Supreme Court of Iowa held that a sentence with a possibility of parole in sixty years based on governor's commutation of a previously imposed mandatory life without parole sentence also violated *Miller*. Noting that the defendant would not be eligible for parole until he was 78.6 years old (id. at *10), the court concluded

> Ragland was originally sentenced without the benefit of an individualized sentencing hearing. The commutation lessened his sentence slightly, but without the court's consideration of any mitigating factors as demanded by *Miller*. While such a review process might still permit a life-without-parole sentence to be imposed in a murder case, it might also result in a sentence far less than life without parole. Thus, Ragland was entitled to be sentenced with consideration of the factors identified in *Miller*. Additionally, he was entitled to be resentenced under the individualized process because *Miller* applies retroactively. ¶ Accordingly, Ragland's commutation did not remove the case from the mandates of *Miller*. The sentence served by Ragland, as commuted, still amounts to cruel and unusual punishment under the Eighth Amendment o the United States Constitution and article I, section 17 of the Iowa Constitution. (*Id.* at *13.)

In the process of reaching its decision, the *Ragland* court noted that courts in other states have observed that the mere possibility of parole for a juvenile offender does not mean the sentence avoids the mandates of *Miller* as a life sentence with parole. (*State v. Ragland, supra,* ___ N.W. 2d ___ 2013 WL 4309970, *11, citing *Parker v. State* (Miss.2013) ___ So.3d ___, ___, 2013 WL 2436630, at *8 [holding a life sentence with an opportunity for "conditional release" on parole at age sixty-five falls within *Miller*]; *Bear Cloud v. State* (Wyo.2013) 294 P.3d 36, 45 [holding a life sentence that provides an opportunity for parole only upon commutation of the