IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)) Plaintiff and Respondent,))) v.))) ANDREW LAWRENCE MOFFETT,)) Defendant and Appellant.))	No. S206771 (Court of Appeal No. A133032) (Contra Costa County Superior Court No. 05051378-8)

On Appeal from a Judgment of
the Superior Court of the State of California
in and for the County of Contra Costa

The Honorable Laurel Brady
Judge Presiding

APPELLANT'S ANSWER BRIEF ON THE MERITS

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v.	)
ANDREW LAWRENCE MOFFETT,	)
Defendant and Appellant.	)

STATEMENT OF ISSUE

This case poses multiple issues concerning the implications of ***Miller* v. *Alabama*** (2012) 567 U.S. ___ [132 S.Ct. 2455] for California's regimen of LWOP sentencing for juveniles convicted of special circumstance murder. The issues include the compatibility of "generally mandatory" presumptive LWOP under section 190.5 with *Miller*; whether remand is required to consider and comply with *Miller* in light of the pre-*Miller* sentencings conducted here; and the constitutionality of LWOP for a juvenile who neither killed nor intended to kill.

STATEMENT OF APPEALABILITY

This is an appeal from a judgment which finally disposes of all issues between the parties. (Pen. Code, § 1237, subd. (a).)

STATEMENT OF THE CASE

A. The Trial And First Appeal.

This is an appeal from a resentencing following a remand for resentencing based on reversal of a peace officer special circumstance for lack of intent to kill, as well as other sentencing errors. The trial court reimposed LWOP plus 24 years for a juvenile felony murder defendant who did not kill or intend to kill or fire a weapon, was not present when his adult accomplice shot at police despite being caught, and whom one court-appointed psychologist considered "profoundly immature." (17 CT 4520.)[1]

Age 17 at the time of the alleged offenses, appellant was jointly tried with an older codefendant Alexander Rashad Hamilton, who received the death penalty for killing a police officer in the course of an alleged robbery. After an early complaint (1 CT 960), appellant was jointly charged in an adult direct-file indictment, filed September 16, 2005, along with his older codefendant. The indictment alleged several counts including murder (with felony murder and peace officer special circumstances) and

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[1] Appellant denotes the one-volume clerk's and reporter's transcripts in the present appeal as "CT" and "RT." Transcripts in the lengthy record of the original trial, of which appellant has requested the Court to take judicial notice, are denoted by volume number. Respondent's opening brief on the merits is designated as "RAOB."

three counts of robbery; there was no allegation appellant discharged a firearm, personally injured any one, or lay in wait. (4 CT 994-1000; see also 3 CT 946 [interlineations by grand jury, including rejection of charges of attempted murder against appellant].)

The joint guilt trial was conducted from June 25-August 13, 2007. (11 CT 3016-14 CT 3938; 4 RT 786-33 RT 7296.) The jury found defendants guilty on all counts, and found all the respective special allegations true as to each defendant (with only coappellant charged with lying in wait). (14 CT 3897-3938, 3939; 33 RT 7296.) Thereafter, the court suspended criminal proceedings for appellant pending competency evaluations. (17 CT 4513.) On July 1, 2008, over objection, the court found appellant competent without a trial and reinstated criminal proceedings. (17 CT 4575.)

On July 24, 2008, the court declined to reduce appellant's LWOP term for murder to 25 years to life (Pen. Code, § 190.5) and sentenced appellant to a prison term of LWOP plus 24 years. (17 CT 4655-4660; 34 RT 7726, 7759-7764; see also 17 CT 4668 [presentence report].)

Appellant timely appealed. (17 CT 4661.)

B. The Decision In The First Appeal.

In its opinion filed November 9, 2010, the Court of Appeal affirmed the guilt judgment in other respects, but reversed the peace officer special circumstance for lack of evidence of intent to kill; even if, contrary to the evidence and the prosecutor (CT 6, 23), appellant was present when the shooting occurred, there was no evidence he intended to kill officer Lasater or fired his weapon. (CT 23-24; Slip Opn., Appeal No. A122763.) This error required remand to determine whether to reduce appellant's murder term to 25 years to life based on the remaining nonkiller felony murder circumstance as applied to a juvenile (Pen. Code, § 190.5). (CT 23-25.)

C. The Resentencing And The Present Appeal.

No updated presentence report was prepared. The original probation report asserted there were no mitigating factors regarding the defendant or the offenses. (17 CT 4689 ["none"]; RT 33-40.) The court also denied a request by appellant for more time in local custody (beyond two weeks which the court granted) to develop mitigation information. (CT 95; RT 25-40.) Defense counsel further requested a medical examination for an injury after appellant reported he was assaulted by local deputies for no reason. (RT 37-40.) The resentencing memoranda discussed the facts of

the case, section 190.5, and cruel and unusual punishment, but did not offer much detail regarding competency proceedings or appellant's prior record or family history. (CT 61, 92, 96.)

Importantly here, the defense conceded "*Graham* only applies to non-homicide situations" (CT 68), while expressing hope the matter would come up on review (RT 68); the prosecution merely asserted appellant did not fall under any extant U.S. Supreme Court cases addressing juveniles (CT 93-94); in reimposing LWOP, the court did not address any such jurisprudence in sentencing appellant either, beyond noting appellant's age gave the court statutory discretion (Pen. Code, § 190.5) and it would not consider any pending state legislation. (RT 73-78; CT 108-117.) Indeed, the court focused on section 190.5 and did not even explicitly mention cruel and unusual punishment despite the defense memoranda. (RT 73-78.)

On appeal, following supplemental briefing addressing the new decision in *Miller*, the Court of Appeal again remanded for resentencing because: (1) because the generally mandatory/presumptive LWOP standard under section 190.5 is contrary to *Miller*; and (2) the trial court needed to consider the new decision in *Miller*. (***People* v. *Moffett*** (2012) 209 Cal.App.4th 1465, 1468, 1474-1479.)

In the Court of Appeal, appellant urged as-applied disproportionality claims under *Miller* as well as state law (***People* v. *Dillon*** (1983) 34 Cal.3d

441), not just categorical *Miller* claims based on lack of intent to kill. In opting for remand, the Court of Appeal very briefly rejected appellant's claims this was not a rare case justifying LWOP under *Miller*. In doing so the court only briefly referenced *Miller*'s refusal to reach a *categorical* bar for juveniles who do not kill or intend to kill and commented that LWOP "may" be justified for such juveniles based on another decision (***People* v. *Blackwell*** (2011) 202 Cal.App.4th 144) which has been granted certiorari with the judgment vacated and the case remanded for reconsideration in light of *Miller* (***Blackwell* v. *California***, 133 S.Ct. 837, No. 12-5832, filed January 7, 2013). (***People* v. *Moffett***, *supra*, 209 Cal.App.4th at pp. 1478-1479.) The Court of Appeal did not address appellant's separate state law cruel and unusual punishment claims or discuss the specific offenses or offender in any detail. (*Ibid.*)

This Court granted respondent's petition for review in ***Moffett*** (No. S206771) and a defense petition for review in a related case (***People* v. *Gutierrez*** (2012) 209 Cal.App.4th 646 (No. S206771)). (See also ***People* v. *Siakasorn*** (2012) 211 Cal.App.4th 909, rev. grt. March 20, 2013, No. S207973 [held behind *Moffett* and *Gutierrez*]; ***People* v. *Silva***, rev. grt. April 10, 2013, No. S208313.)

STATEMENT OF THE FACTS

The basic facts as presented at trial have been summarized by the Court of Appeal. (***People* v. *Moffett***, *supra*, 209 Cal.App.4th at pp. 1468-1471; see also CT 5-8 [Slip Opinion in first appeal].)

Andrew Moffett was 17 at the time of the offenses. (17 CT 4668.) It is undisputed that his adult codefendant Alexander Hamilton, not appellant, was the shooter.

Around 5:45 p.m. on April 23, 2005, after appellant had another friend steal a car in exchange for marijuana (25 RT 5757-5766, 5797), appellant and Hamilton, both armed with loaded firearms with their faces covered, robbed a grocery store (and a bank inside), then left in the car with money; according to the prosecution, the taller appellant robbed the grocery teller Rima Bosso at gunpoint, while codefendant robbed the Wells Fargo clerks. (22 RT 5026, 5034, 5044, 5154, 5174; 23 RT 5128, 5278; 26 RT 5958; 28 RT 6383.)

A car crash (the getaway vehicle) in the surrounding area went out on the radio within minutes; the fatal shooting and a second set of shots (the attempted murder counts not charged against appellant) followed some minutes later. (22 RT 5026, 5039, 5047-5052; 24 RT 5448; 25 RT 5697; 26 RT 6008.) Near the crash scene, a neighbor recalled the taller

passenger with a hooded sweatshirt and something white over his face picked up a gun; the shorter driver followed the passenger over a fence with some difficulty. (23 RT 5401-5405.) Another neighbor pursued the men until the taller man threatened to "cap" him from the other side of the fence, although he did not see a gun. (23 RT 5416-5418, 5421.)

Officer John Florance and the decedent Officer Larry Lasater were on uniformed patrol in marked vehicles. (24 RT 5445-5446; 27 RT 6339.) In an attempt to cover the possible flight area, they exited their vehicles and ran towards a trail. (24 RT 5450-5454.) Within two or three seconds of hearing Lasater yell about a black male, Florance heard the sound of someone jumping a fence and saw Lasater draw his weapon. (24 RT 5459, 5497, 5509.)

Lasater turned south to the right, walked toward some bushes, and shouted, "Show me your hands." (24 RT 5460-5462.) Shots rang out; officer Lasater sustained two bullet wounds, one to his leg and a fatal wound to his neck. (24 RT 5462-5464; 26 RT 6033; 28 RT 6433, 6446.) The first report of shots fired occurred about 34 seconds *after* officer Florance reported hearing someone jumping a fence. (26 RT 6017-6018, 6023.) A second set of shots toward officers occurred several minutes later. (24 RT 5470, 5544-5545; 26 RT 6023.)

Hamilton was arrested wearing a dark jacket, a white T-shirt, and a

dark cloth around his neck in the tall grass after the second set of shots. (22 RT 5040-5044, 5056, 5131; 24 RT 5473; 26 RT 6038.) Police found an empty Glock handgun near Hamilton, as well as cash by the fence. (22 RT 5108, 5138; 24 RT 5644; 27 RT 6158-6166.) A bullet recovered from officer Lasater was fired from a Glock, not the Lorcin handgun found later and assertedly linked to appellant. (28 RT 6413-6415.) A cellphone linked to appellant was found near the fence on the trail side. (26 RT 5949, 6091; 27 RT 6155.)[2]

A neighbor living on Remische on the south side of the fence, Ms. Huyck, was in the kitchen. (25 RT 5848-5849, 5852.) Her granddaughters said someone ran through their yard, so she started locking up the house; when she heard a thump out front, she ran out and saw a garbage can knocked over in the front yard. (*Ibid.*) She went back inside, locked the garage door, then went out in the backyard and heard someone yelling for Larry. (*Ibid.*) She did not recall hearing any gunshots until at least *after* she went out front. (25 RT 5857-5858.)[3]

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[2] Appellant was the taller of the two defendants in court. (29 RT 6663-6664.) Several persons reported the shorter chubbier guy was winded and having more problems jumping fences. (25 RT 5814-5816, 5819, 5824-5826; 29 RT 6654-6657.)

[3] Since respondent concedes there is no evidence appellant killed or intended that coappellant kill officer Lasater (RAOB 33), appellant will not belabor respondent's view (RAOB 7), contrary to the prosecutor and the

Later, another neighbor saw a young Black man running into her garage; the man had long curly ringlets in his hair, stood about five-eight, was bare-chested, and was holding a white T-shirt; when she yelled "no, the man left her garage and ran across the street. (25 RT 5868-5871.)

Later, an officer found a shirtless appellant hiding in a backyard; he was lying in a fetal position, under a small tree near a T-shirt. (26 RT 5928-5932, 5935.) Appellant said "don't kill me" and surrendered unarmed. (26 RT 5928-5934; 27 RT 6317-6318.)

The next day, another neighbor checked a flower pot and found a handgun (a fully loaded Lorcin semiautomatic with a bullet in the chamber; 27 RT 6201) under six inches of soil. (25 RT 5898; 26 RT 5974.) In or on a garbage can nextdoor police found: a white plastic Food Maxx grocery bag with money ($4027) inside and some blood on it; an empty Walmart bag; a black shirt; and a suspected blood smear on the lid of the garbage can. (26 RT 5977-5979, 5995-5997, 6072-6074; 27 RT 6203-6206, 6275.)

DNA from the garbage can lid and a plastic bag inside was consistent with appellant. (28 RT 6477-6487.) Tests reflected gunshot residue (GSR)

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evidence, that appellant was present when coappellant fired. If appellant was present, this is one more indication that he was not of the mind to harm anyone. However, unless officer Florance and two persons in the Huyck house were wrong about when someone jumped a fence or when shots were fired, it seems clear appellant was over the fence and gone. (See, e.g., 30 RT 6889-6893 [court and prosecutor].)

on both defendants' hands. (27 RT 6289-6297.)[4]

[4] There was no claim appellant fired the (fully loaded) Lorcin. The parties stipulated that the GSR findings show only that a person fired a gun, was near a gun when fired, or handled a gun or other object contaminated with GSR; and GSR may be present merely by touching a surface with such residue on it. (29 RT 6691.)

ARGUMENT

I. THE "GENERALLY MANDATORY"/PRESUMPTIVE LWOP STANDARD APPLIED UNDER SECTION 190.5 IS FLATLY INCONSISTENT WITH THE BINDING RATIO DECIDENDI OF *MILLER*.

A. PROCEDURAL AND FACTUAL BACKGROUND.

Because appellant was 17 at the time of the homicide, the court was required to impose the presumptive penalty of LWOP unless it exercised its discretion to reduce the term for special circumstance murder to 25 to life (plus 24 years under other allegations, for a total of 49 years to life). (Pen. Code, § 190.5, subd. (b).)

The original sentencing in 2008 occurred before the decision in *Graham* **v.** *Florida* (2010) 560 U.S. ___ [130 S.Ct. 2011; 176 L.Ed.2d 825]. As noted, the original probation report stated there were no mitigating factors and no updated report would be offered before resentencing either. (17 CT 4689.)

The sum total of appellant's record in the original probation report reflects sustained juvenile violations in 2003-2004 for: possession of marijuana; misdemeanor assault for shooting someone with a BB gun; a probation violation "fight" with a juvenile ward; a probation violation for a positive cocaine test; and misdemeanor drug violations, apparently

coupled with a felony stolen property plea (which appellant disputed; RT 33-34). (17 CT 4692.) Few underlying details regarding the sustained violations (some by plea) are offered and the trial court would cite none; appellant had never been sentenced to CYA, only to boys ranch, and he had no adult convictions or referrals to adult court based on unfitness. (17 CT 4692; see also 17 CT 4675-4687.) He had threatened suicide while in juvenile custody (apparently in conjunction with the "fight"). (17 CT 4628, 4675-4687; see also 17 RT 4521-4523.) According to the probation report, his mother and grandparents were his primary caregivers; his parents never married; his father had a criminal history and problems with drug abuse, but had complained appellant was not receiving adequate supervision at home. (*Ibid.*)

At the original sentencing, despite recognizing appellant's age and relatively non "extensive" record, the court declined to reduce the LWOP term; in doing so the court placed heavy reliance on the continuing psychological damage caused to Ms. Bosso (the clerk whom the prosecutor argued appellant robbed). (34 RT 7760-7763.) There was only brief mention of appellant's age or cruel and unusual punishment. (34 RT 7746-7748, 7760-7763.)

However, while not addressed at sentencing (or during competency proceedings), there was evidence of significant, perhaps profound,

immaturity from at least one apparently disinterested source. In the course of competency reports, one court-appointed psychologist Dr. Wornian (who ultimately decided appellant was competent consistent with the prosecution's view) noted that:

> There was an *abundance of evidence* to recommend that appellant is *profoundly immature adult*.

(17 CT 4520 [emph. added]; see also 17 CT 4442, 4501-4505 [father considered appellant "immature, like a kid in mind" and did not think appellant could drive a car].)

As noted earlier, the Court of Appeal reversed the peace officer special circumstance for lack of intent to kill and remanded for resentencing.

No updated probation report was prepared and the court denied requests for more time to develop mitigation; the defense conceded *Graham* only applied to homicides. (Statement of the Case, Part C, *ante*; RT 73-77.) The court barely mentioned age (except as statutory authorization for reduction) or even cruel and unusual punishment (despite defense arguments on the issue based on analogy to *Graham*); and the court did not mention

appellant's personal background beyond his juvenile probation. (*Ibid.*)[5]

In declining to reduce LWOP at the resentencing, the court cited "four entries" regarding appellant's juvenile history and indications of marginal performance on probation; no further details on this or appellant's family history were offered. (RT 76; 17 CT 4679, 4692.) The court wrongly termed the misdemeanor "assault with a deadly weapon" (actually a BB gun) as a "felony." (*Ibid.*) Despite *Graham*'s ban on juvenile LWOP in nonhomicide cases, in imposing LWOP the court again found the victim impact testimony of the surviving robbery victim Ms. Bosso "extremely profound" and "very compelling." (RT 75.)

The court cited the undoubted grievous loss to officer Lasater's family. (RT 76.) The court also cited appellant's active participation in the robbery. (RT 76.) The court also suggested gunshot residue on appellant meant appellant was close to the gun when it *fired* (versus transfer/handling contacts acknowledged in the trial stipulation; 29 RT 6691). (RT 76.)

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[5] The court was not specific regarding the standard it applied; the court stated it did not think the facts "support" reduction and a reduced term would not be "appropriate." (RT 77.) However, consistent with ***People* v. *Guinn*** (1994) 28 Cal.4th 1130 and other cases, at the outset of sentencing the court stated the "central issue[] ... is whether or not the court will exercise discretion pursuant to Penal Code Section 190.5 and *deviate from the statutory requirement of life without possibility of parole* and sentence Mr. Moffett to a determinate [sic] term of 25 years to life." (RT 73 [emph. added].)

B. STANDARDS OF REVIEW (INCLUDING THE NEED FOR ROBUST INDEPENDENT REVIEW OF *MILLER* CLAIMS); CANONS OF CONSTRUCTION FOR STATUTES POSING POTENTIAL CONSTITUTIONAL CONCERNS.

Underlying cruel and unusual punishment claims are subject to independent review, including mixed questions of law and fact on established historical facts, except that deference is accorded any supportable trial court findings on "substantial conflicting evidence" regarding material historical facts. (***People* v. *Mora*** (1995) 39 Cal.App.4th 607, 615-616; see also ***People* v. *Meeks*** (2004) 123 Cal.App.4th 695, 706-707; ***People* v. *Mantanez*** (2002) 98 Cal.App.4th 354, 358.)

Moreover, particularly in areas of constitutional law like this where the law awaits further development after *Miller*, "'[i]ndependent review is ... necessary if appellate courts are to maintain control of, and to clarify, the legal principles.'" (***People* v. *Cromer*** (2001) 24 Cal.4th 889, 901 [cit. om.].) Absent searching independent review on constitutional issues, trial courts could draw "general conclusions" on similar facts, resulting in disparate results in similar cases. (*Id.* at pp. 900-901.) Further, as noted in *Roper*, these upsetting special circumstance murder cases are apt to overwhelm sentencers and result in overreaching by the parties, despite objective evidence of mitigation. (See ***Roper* v. *Simmons*** (2005) 543 U.S.

551, 572-573.) In such troubling and difficult cases where the law is still fairly undeveloped after *Miller*, *Cromer*'s admonitions favoring stringent independent review to avoid disparate results based on general conclusions/characterizations carry particular weight. (See also ***Miller* v. *Fenton*** (1985) 474 U.S. 104, 116-117; ***People* v. *Thompson*** (2010) 49 Cal.4th 79, 100.)

Turning to canons of statutory construction, statutes should be interpreted whenever possible to preserve their constitutionality. (***Dyna-Med, Inc.* v. *Fair Employment & Housing Comm.*** (1987) 43 Cal.3d 1379, 1387.) Importantly here, even if a statute is reasonably susceptible of two constructions, the court will adopt the construction which avoids significant constitutional concerns, even though other construction is equally reasonable. (***People* v. *Superior Court (Romero)*** (1996) 13 Cal.4th 497, 509.) Further, it is settled that any true ambiguity in the meaning *or application* of statutory language, constitutional or not, must be resolved in favor of the defendant. (***People* v. *Avery*** (2002) 27 Cal.4th 49, 57-58.)

C. THE "GENERALLY MANDATORY"/PRESUMPTIVE LWOP STANDARD APPLIED UNDER SECTION 190.5 BY CASE LAW IS FLATLY INCONSISTENT WITH THE BINDING RATIO DECIDENDI OF *MILLER*.

Penal Code section 190.5 provides that the penalty for a person convicted of special circumstance murder "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." (Pen. Code, § 190.5, subd. (b) [emph. added].) The highlighted mandatory language has been construed in a manner that significantly circumscribes this exercise of discretion.

Decided well before sentencing here, ***People* v. *Guinn*** (1994) 28 Cal.4th 1130, holds courts "*must*" impose LWOP as the presumptive -- indeed "*generally mandatory*" -- term absent "good reason" to choose the less severe term of 25 years to life. (*Id.* at pp. 1141-1142 [emph. added]; accord, ***People* v. *Murray*** (2012) 203 Cal.App.4th 277, 282; ***People* v. *Blackwell*** (2011) 202 Cal.App.4th 144, 159; ***People* v. *Ybarra*** (2008) 166 Cal.App.4th 144, 159.) The trial court presumably applied this unanimous controlling case law standard in its ruling regarding reduction here. (Evid. Code, § 664.) Quoted above, the trial court's comments here certainly indicate as much. The Court of Appeal so found (***People* v. *Moffett***, *supra*,

209 Cal.App.4th at p. 1476) and respondent does not challenge this conclusion either.

As indicated by the trial court's comments here, a "generally mandatory"/presumptive LWOP absent "good cause" standard is quite significant as a burden of production and persuasion. Even assuming California is a discretionary LWOP state (ROAB 15-20), the controlling "generally mandatory"/presumptive LWOP standard applied under section 190.5 is flatly contrary to the binding ratio decidendi of *Miller*.

Respondent's arguments to the contrary are unpersuasive. The entire point of several binding directive admonitions made by the Court in *Miller* is to ensure not merely individualized discretionary sentencing, but that courts will really honor its considered views regarding the general penological doubt for imposing the harshest penalty of LWOP on a juvenile even in homicide cases. (See ***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2472, fn. 11 [mandatory LWOP conflicts with "the fundamental principles of *Roper, Graham,*" not just the "individualized sentencing cases"].) A brief overview of the law, culminating with the admonitions stated in *Miller* and noted by this Court in *Caballero*, illustrates the point.

In categorically barring capital punishment for persons under 18, *Roper* noted the Court was establishing a workable bright line rule of 18 years (not 16 years as under former law). (See ***Roper* v. *Simmons*** (2005)

543 U.S. 551, 572-574.) *Roper* explains this is an imperfect but necessary rule for the courts (now applicable to homicide cases as well), which is required due to (1) the growing and established evidence of marked differences between juveniles and adults and (2) the fact even experts (much less courts) cannot reliably predict the prospects for reform for juveniles or assess true special maturity or depravity. (*Ibid.*)

Thus, the bright line of 18 years of age rule applies despite the facts that: the rule is subject to objections it is arbitrary going both ways, including the fact that "the qualities that distinguish juveniles from adults *do not disappear when an individual turns 18*" either; experts, much less courts, cannot reliably distinguish the rare juvenile offender reflecting irreparable corruption from immature juveniles; and, indeed, the DSM explicitly *forbids* psychologists from diagnosing sociopathic disorders for any patient under 18. (*Ibid.* [emph. added].) The Court concludes a categorical bar is needed even though "it can be argued, although we by no means concede the point, that a *rare case* might arise in which a juvenile offender has *sufficient psychological maturity, and* at the same time demonstrates *sufficient depravity*, to merit a sentence of death." (*Id.* at p. 572 [emph. added].)

In *Graham*, the Court extended this same reasoning in holding the uniquely harsh sentence of LWOP is categorically barred in nonhomicide

cases for the same broad class of juvenile defendants. The Court relied on the same and growing evidence of marked developmental differences in juveniles compared to adults (based on developments in psychology and brain science), which both mitigate juveniles' culpability and enhance their prospects for reform. (***Graham* v. *Florida*** (2010) 560 U.S.___ [130 S.Ct 2011, 2023-2033; 176 L.Ed.2d 825].) The Court affirmed *Roper*'s doubt whether courts "could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." (*Id.* at p. 2032.) The Court added that bare "consideration of the defendant's age as a mitigating factor in sentencing" (as urged by respondent here (RAOB 19)) was not sufficient to permit discretionary LWOP sentencing in the nonhomicide context. (*Ibid.*) The Court also stressed the unique severity and unfairness of LWOP for youthful offenders who are most capable of change (compounded by the "perverse consequence" that prisons often limit life-development programs for no-parole offenders). (*Id.* at pp. 2028, 2032-2033.)

Thereafter in *Miller*, the Court found the growing science and social science regarding juvenile development "has become even stronger." (***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2465, fn. 5.) While declining to reach categorical bars, the (binding) majority opinion in *Miller* throughout strongly reaffirms the Court's "general[] doubt[]" for any

penological justification for imposing LWOP on any juvenile, without regard to particular age. (*Id.* at p. 2466.) The majority adds several points relevant here. The science of juvenile brain development is *not* "crime-specific." (*Id.* at p. 2464-2465.) The transient signature qualities of youth are more than bare chronology and they apply to the entire class of juveniles. (*Id.* at p. 2467) Youth is entitled to *central* consideration. (*Id.* at p. 2466.) Youth and personal family background are entitled to *heavy* consideration (even for a 16 year old who shoots a police officer). (*Id.* at p. 2467).) And similar to the death penalty, a term of LWOP is unique and irrevocable, calling for distinctive treatment. (*Id.* at p. 2466-2467.) The Court reaffirmed studies relied upon in *Roper* showing that "'only a relatively small proportion of'" of juveniles who engage in illegal activity develop entrenched patterns of bad behavior. (*Id.* at p. 2464 [cit. om.].)[6]

Miller plainly *holds* (not just remarks) that the rationales of its previous cases (recognizing the severity of LWOP and the difficulty of distinguishing the rare juvenile offender evincing irreparable corruption for purposes of justifying LWOP) carry over into homicide cases as well. (***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2469.) Similarly, the Court

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[6] It bears noting *Roper* involved a 17-year old like appellant, except that the defendant there made statements he planned to kill someone and did so. (See ***Roper* v. *Simmons***, *supra*, 543 U.S. at p. 556.)

stated "[o]ur decision ... *mandates* ... that a sentencer follow a certain process--considering an offender's youth and attendant characteristics--before imposing a particular penalty." (*Id.* at p. 2471 [emph. added].) "And in so *requiring*, our decision *flows straightforwardly from our precedents*: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments." (*Ibid.* [emph. added].) In short, the Court declined to reach categorical bars but took pains to admonish LWOP is not the norm:

> By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a [mandatory] scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we *do not consider* Jackson's and Miller's alternative argument that the Eighth Amendment requires *a categorical bar* on life without parole for juveniles, or at least for those 14 and younger. But 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*. This 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.) Although we do 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 those differences counsel against*** *irrevocably sentencing them to a lifetime in prison.*

(***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2469 [emph. added].)

Thus, this Court has quoted *Miller* as broadly applicable to any juvenile criminal case (in the very same context of botched robberies involved here):

> "[N]one of what [*Graham*] said about children -- about their distinctive (and transitory) mental traits and environmental vulnerabilities -- is crime-specific. Those features [of youth] are evident *in the same way, and to the same degree*, when (as in both cases here) a botched robbery turns into a killing. So *Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile*, even as its categorical bar relates only to nonhomicide offenses."

(***People* v. *Caballero*** (2012) 55 Cal.4th 262, 267 [quoting ***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2465] [emph. added].) In short, *Miller* "extended *Graham*'s reasoning (but not its categorical ban) to homicide cases." (***People* v. *Caballero***, *supra*, 55 Cal.4th at p. 267.)

Against this background, respondent's discussion of actual sentencing numbers (RAOB 26-27) to suggest LWOPs are still rare in this state (where LWOP is limited to 16- or 17-year-olds) is "unilluminating." (***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2472, fn. 11.) Indeed, respondent's discussion of individualized sentencing (RAOB 15-19) misses the entire other half of *Miller*'s ratio decidendi, which is addressed to how "the fundamental principles of *Roper, Graham*" (***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2472, fn. 11) regarding juveniles "counsel against" (***Miller* v.**

Alabama, *supra*, 132 S.Ct. at p. 2469) imposition of LWOP, not just individualized sentencing principles. Not a single one of the state sentencing rules cited by respondent (RAOB 18-19) recognizes the distinctive *Roper/Graham/Miller* mitigating developmental principles for juveniles, while the controlling state standard makes LWOP generally mandatory.

While respondent does not explicitly argue *Miller* is dicta, respondent effectively does so by limiting its discussion to discretionary versus mandatory sentencing, arguing *Miller*'s holding was limited to disapproving mandatory LWOP, and arguing the Court of Appeal erred in divining the "spirit" of *Miller* beyond that narrow holding. In essence, respondent suggests that *everything* else *Miller* says beyond proscribing mandatory LWOP is mere dicta. (RAOB 26.) This is incorrect.

Reviewing courts have discretion how broadly to state their holdings and to what extent to explain their holdings as binding ratio decidendi. *Miller* could (with great difficulty) hold mandatory LWOP unconstitutional without adding a word of explanation. It certainly did not.

Even if some isolated remarks in the discussion (e.g., that LWOPs will be uncommon) were mere considered dicta, the bulk of the Court's discussion surely is binding holding and ratio decidendi. (See Witkin, *Cal. Procedure* (3d ed. 1985) Appeal, § 783, p. 753; ***Hubbard* v. *Superior***

Court (1997) 66 Cal.App.4th 1163, 1168 [explication of significant subsidiary issue related to broader due process challenge]; ***United Steel Workers*** **v.** ***Board of Education*** (1984) 162 Cal.App.3d 823, 834-835 [statements "probably intended for guidance of the court and attorneys upon a new hearing" cannot be considered mere dicta].)

Contrary to respondent's suggestions of dicta, the court explained *why* mandatory LWOP is unconstitutional *and* what is required instead; the discussion is addressed to flip sides of the same issue (mandatory versus discretionary LWOP and juvenile LWOP generally), not different issues; and it is phrased in mandatory directive terms, both to explain why LWOP is unconstitutional and to afford guidance in remands for discretionary LWOP in those cases. The Court's discussion is hardly *all* limited to mandatory LWOP cases or jurisdictions. It certainly applied to the remands for discretionary resentencings ordered in *Miller* itself; it applied to *Blackwell*; and it applies to discretionary LWOPs generally. The full categorical bars of cases like *Roper* or *Graham* may not apply in homicide cases yet, but the reasoning of these former cases (not just the individualized sentencing cases) surely does, as this Court noted in *Caballero*. With the possible exception of the comment that LWOP should be uncommon (which is at least considered dictum and really just a restatement or corollary of the fundamental principles of *Roper* and

Graham), this is not dicta.[7]

In sum, California's "generally mandatory"/presumptive LWOP absent "good cause" standard is flatly inconsistent with: "general penological doubt" for LWOP; the "fundamental principles of *Roper* and *Graham*" that "counsel against" LWOP, not for it; and the High Court's view, based on these fundamental principles, that the "appropriate occasions" for imposing this harshest of punishments will be "uncommon," except (possibly) for a "few" "rare" incorrigible offenders. As the Court of Appeal here found, "generally mandatory" juvenile LWOP turns the Supreme Court precedent "on its head." (***People* v. *Moffett***, *supra*, 209 Cal.App.4th at pp. 1477.)

As the Court of Appeal further held, in light of these patent constitutional problems after *Miller*, and the canons of constructions set forth above, section 190.5 must now be construed without reference to presumptive LWOP in order to avoid serious constitutional concerns.

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[7] The Court's view LWOP should be uncommon itself is, at the very least, "well considered" (***People* v. *McAlpin*** (1991) 53 Cal.3d 1289 1308), indeed pointed, Supreme Court dictum entitled to considerable deference in state and federal courts alike. (***People* v. *Viray*** (2005) 134 Cal.App.4th 1186, 1207, fn. 12; ***California Apartment Association* v. *City of Stockton*** (2000) 80 Cal.App.4th 699, 710; ***Smith* v. *County of Los Angeles*** (1989) 214 Cal.App.3d 266, 297; see also ***United States* v. *Montero-Camargo*** (9th Cir. 2000) 208 F.3d 1122, 1132, fn. 17; 9 Witkin, *Cal. Procedure* (4th Ed. 1997) Appeal, sec. 947.)

However, appellant adds section 190.5 must be construed both (1) without reference to a presumption and (2) with reference to *Miller*'s direction that courts "take into account how children are different, and how those differences *counsel against* irrevocably sentencing them to a lifetime in prison." (***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2469 [emph. added].) Appellant respectfully requests this Court to make both points clear here.[8]

[8] Appellant discusses the prejudice resulting from the erroneous presumption (and further case-specific remand instructions) later in this brief. (See Argument III, *post*.)

II. EVEN IF THE *GUINN* STANDARD OF GENERALLY MANDATORY LWOP WERE CONSTITUTIONAL, THE COURT OF APPEAL PROPERLY REMANDED THE CASE SIMPLY TO CONSIDER AND COMPLY WITH THE SIGNIFICANT NEW DECISION IN *MILLER*.

Respondent argues reversal and reinstatement of LWOP is required because presumptive LWOP is constitutional. (RAOB 30.) But contrary to respondent, the grounds for remand here are three-fold and they are not limited to the presumption issue or the individualized sentencing aspect of *Miller*. The Court of Appeal did not merely remand for resentencing on grounds presumptive LWOP is contrary to *Miller*. It also rightly remanded on grounds (1) the trial court needed to consider the new decision in *Miller* and (2) because several case-specific errors and comments at sentencing here were also problematic in light of *Miller*. (***People* v. *Moffett***, *supra*, 209 Cal.App.4th at pp. 1468, 1474-1479.)

Contrary to respondent, even if presumptive LWOP were proper, which it is not, remand is required simply to consider and comply with the significant new decision in *Miller*. (See, e.g., ***Daugherty* v. *State*** (Flor. App. 2012) 96 So.2d 1076, 1079-1080 [2012 Fla.App.LEXIS 14868] [No. 4D08-4624] [remand required to consider *Miller* even where term of LWOP was not mandatory]; ***Sen* v. *State*** (Wy. 2013) ___ Wyo. ___ [No. S-11-0151; opn. filed April 24, 2013] [2013 Wyo. LEXIS 51, *pp. 55-61]

[rejecting claims consideration of some factors related to youth in pre-*Miller* sentencing warranted affirmance of LWOP].) As *Sen* notes, a juvenile homicide defendant is "entitled to" informed consideration of *Miller* decision and its discussion of the distinctive characteristics of youth, particularly in light of *Miller*'s admonition juvenile LWOP should be uncommon. (*Ibid*; see also ***Jackson* v. *Norris*** (Ark. 2013) ___ Ark. ___ [No. 09-145, opn. filed April 25, 2013] [2013 Ark. LEXIS 201, **p. 10-11] [rejecting state's request for appellate determination of LWOP; defendant entitled to present "*Miller* evidence" upon resentencing].)

Miller is a very significant case that "extended *Graham*'s reasoning (but not its categorical ban) to homicide cases." (***People* v. *Caballero***, *supra*, 55 Cal.4th at p. 267.) With no disrespect to the trial court, this was a routine juvenile LWOP sentencing on standard aggravators, which is just not the norm after *Miller*. The trial court could not and did not consider the later decision in *Miller* and did not remotely seek to comply with it or anticipate it.

As noted, no updated probation report was prepared; the court denied requests for more time to develop mitigation. Importantly, the defense conceded *Graham* only applied to homicides, while the prosecution argued no U.S. Supreme Court juvenile jurisprudence applied here. The court barely mentioned age (except as statutory authorization for reduction) or

even cruel and unusual punishment (despite defense arguments on the issue based on analogy to *Graham*); and the court did not mention appellant's background beyond his juvenile probation, much less the psychologist's opinion there was abundant evidence of profound immaturity. (RT 73-77; 17 CT 4520; Statement of the Case, Part C, *ante*; Argument I, Part A, *ante*.)

Without belaboring the point, it seems clear the court here simply did not "take into account how children are different," much less "how those differences counsel against irrevocably sentencing them to a lifetime in prison," or the rest of *Miller*'s discussion about the signature qualities of youth and the defendant's personal history. (***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2467-2471.) Beyond mentioning age as authorization for reduction and criminal history, the court did not mention a *single one* of the hallmark features of youth[9] that militate against a determination of lifelong incorrigibility at this age. Passing mention of age as statutory authorization, along with heavy reliance on offense-related aggravators and rote legal (not personal) history, is simply not compliance with the

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[9] Most notably: immaturity; an unformed character and greater capacity for change; impetuosity; inability to fully appreciate risks or deal with legal proceedings; and pointed vulnerability to negative environments and peer pressure. (***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2467-2471; see also ***Sen* v. *State***, *supra*, 2013 Wyo. LEXIS at **pp. 49-51.)

constitutional dictates of *Miller*. This is recognized in cases like *Sen* and *Daugherty* and it is certainly true here. Setting aside unpublished remands to consider *Miller*, the great weight of authority rightly favors remand. The contrary result represented by *Gutierrez* (the companion case before this Court) is clearly an outlier, and rightly so.

Further, setting aside evidence of profound immaturity here (never addressed at sentencing), respondent's insistence the relevance of appellant's age at just under 18 was "virtually nil" (RAOB 20) is flatly contrary the High Court's efforts to craft appropriate rules for a juvenile class of defendants beginning with the 17-year-old in *Roper*. (***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2469 [*Roper* and *Graham* (both involving 17-year-olds) present "this early age" that makes predictions of lifelong incorrigibility problematic].) But "virtually nil" is exactly how appellant's age was treated here, compounded by a standard of presumptive LWOP. In short, appellant received LWOP without consideration of *Miller*'s fundamental principles and with a presumption in favor of LWOP, not consideration of these fundamental principles and how they counsel against LWOP.

Finally, the need for remand is especially clear where the Court of Appeal further found "remand is appropriate" because several of the trial court's sentencing reasons were problematic in light of *Miller*, including:

(1) failure to properly consider the twice-diminished culpability of juvenile felony-murder defendants who do not kill or intend to kill (which appellant concededly did not); (2) heavy reliance on trauma to a surviving victim; and (3) the court's mistaken view appellant's assault violation was a felony when it was a misdemeanor. (***People* v. *Moffett***, *supra*, 209 Cal.App.4th at pp. 1477-1479; see also Pen. Code, § 1170, subd. (d)(2)(F)(ii) [in assessing juvenile LWOP petition for discretionary sentence recall, court to consider absence of any "juvenile *felony* adjudications for assault or other *felony* crimes with a significant potential for harm ..."] [emph. added].)

In sum, the court did not follow the "certain process" (***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2469) mandated by *Miller*. The process described may not be detailed or formalistic, but the implications are very significant. Indeed, without regard to traditional prejudice analysis addressed in the next argument, it seems clear that prudential or discretionary remand is "just under the circumstances" (Pen. Code, § 1260) and should be ordered. Setting aside presumptions, process, or prejudice labels, failure to remand a case like this to consider such a significant new decision impacting juvenile LWOP is contrary to justice.

III. ALONE OR IN COMBINATION, THE THREE DISTINCT CLASSES OF ERROR REFLECTED IN THIS CASE AFTER *MILLER* REQUIRE REVERSAL UNDER ANY STANDARD; CAREFUL REMAND DIRECTIONS ARE SORELY NEEDED AND SHOULD BE GIVEN.

A. ALONE OR IN COMBINATION, THREE CLASSES OF ERROR HERE REQUIRE REVERSAL UNDER ANY STANDARD.

Respondent agrees the stringent beyond-a-reasonable doubt prejudice standard (***People* v. *Chapman*** (1967) 386 U.S. 18, 24) applies if presumptive LWOP is contrary to *Miller* (RAOB 30); and the same is surely true for the two distinct errors noted in the previous argument. However, respondent again errs in limiting its prejudice discussion to the presumption error. (RAOB 30-34.) Alone or in combination, the three distinct classes of error reflected in this case after *Miller* require remand for resentencing under any standard. (See ***Taylor* v. *Kentucky*** (1978) 436 U.S. 478, 486-490 [cumulative errors]; ***People* v. *Ryner*** (1985) 164 Cal.App.3d 1075, 1087 [same].)

Setting aside prudential remand (Pen. Code, § 1260), in appellant's view the first two errors alone require per se reversal. The complete failure to consider or comply with *Miller* and its ranging factors and rationales, coupled with application of a generally mandatory LWOP standard, affected the integrity of the sentencing process itself and produced

consequences that are necessarily unquantifiable and indeterminate. (***Neder* v. *United States*** (1999) 527 U.S. 1 [119 S.Ct. 1827, 1833-1835].) This is especially so where the errors affect the defendant's ability to create a record and present a defense. (***Jackson* v. *Norris***, *supra*, 2013 Ark. at **pp. 10-11 [defendant entitled to present "*Miller* evidence" upon resentencing]; see also ***Presnell* v. *Georgia*** (1978) 439 U.S. 14, 16-17; ***Rose* v. *Clark*** (1986) 478 U.S. 570, 579, n. 7.) Similarly, remand is typically required without resort to prejudice analysis in cases presenting failures to exercise informed sentencing discretion, particularly material misunderstandings regarding legal standards. (See, e.g., ***People* v. *Belmontes*** (1983) 34 Cal.3d 335, 348, fn. 8; ***People* v. *Alvarez*** (2002) 95 Cal.App.4th 403, 409-410 [court believed defendant was presumptively ineligible for probation].) As this Court has put it, in the face of material errors impacting informed sentencing discretion, especially legal ones, "fundamental fairness requires that the defendant be afforded a new hearing and 'an informed, intelligent and just decision' ..." (***People* v. *Ruiz*** (1975) 14 Cal.3d 163, 168 [cit. om.]; accord, ***Sen* v. *State***, *supra*, 2013 Wyo. LEXIS 51, *pp. 55-61 [defendant entitled to informed consideration of decision in *Miller*].)

In any event, even where *Chapman* applies, the courts recognize

certain changes in law impacting sentencing make prejudice analysis problematic where the change impacts the ability of the defense to develop a record or argue issues which are subject to dispute or varying weight at sentencing; this is especially true for sentencing factors which (like the *Miller* factors) are often vague or subjective. (See ***People* v. *Sandoval*** (2007) 41 Cal.4th 825, 838-843 [failure to submit six sentencing aggravators found by court to a jury could not be considered harmless beyond a reasonable doubt; Court could not conclude beyond a reasonable doubt that a single one of the six aggravators would have been found true by a jury].)

Indeed, even under the state law prejudice standard (***People* v. *Watson*** (1956) 46 Cal.2d 818, 836), an error regarding an aggravating factor means the court "must reverse where it cannot determine whether the improper factor was determinative for the sentencing court." (***People* v. *Avalos*** (1984) 37 Cal.3d 216, 233.) This is required because of the statutory preference in favor of the middle term (similar to *Miller*'s effective preference against LWOP here). (*Ibid.*)

Against this background, respondent's arguments (limited to the presumption issue) any error is harmless beyond a reasonable doubt are unpersuasive as to any of the errors here, much less all the errors in combination. (RAOB 30-34.) Albeit based on authority arising after this

sentencing, the errors here are three-fold, not one-fold. And they come in a case in which a profoundly immature juvenile neither killed nor intended to kill anyone. The term of 49 years to life appellant faces even after an exercise of discretion under section 190.5 is hardly inconsequential either. In short, the complete failure to consider and comply with *Miller*, on top of application of an improper "generally mandatory" LWOP standard and reliance on factors which the Court of Appeal found problematic after *Miller*, are acute error under any prejudice standard. Contrary to respondent, heavy reliance on standard aggravators that had nothing to do with *Miller* do not change this.

Moreover, appellant's record (BB guns, drugs, and fights) is no record of a hard-core juvenile gangster, but of a teenager. Aside from disinterested expert indications of profound immaturity and lack of intent to harm anyone (*especially* an armed police officer), appellant's actions under stress towards two groups of police officers and a woman in her garage speak more loudly to the person before the court than competing experts, attorneys, or legal recklessness standards ever will. Despite this undoubted tragedy, the law must be respected and felony-murder and standard aggravators are no longer a complete answer. If there could ever be any truly exceptional case permitting a finding of harmless error, which is doubtful, this is not one of them. Reversal is required.

B. CAREFUL REMAND INSTRUCTIONS ARE URGENTLY NEEDED FOR THIS DEFENDANT AND OTHERS.

Roper's concerns about overreaching and upsetting cases overwhelming objective mitigation apply strongly here, as do *Cromer*'s concerns about disparate results based on general conclusions on like facts (especially conclusions on vague or subjective sentencing factors like those noted in *Sandoval*). (See Argument I(B), *ante*.) The human tragedy of the death of an expectant father who deserved to go home from work is upsetting enough. The impact on the trial court is seriously compounded by officer Lasater's status as a police officer, which impacted even the legislature in excluding such cases from modest discretionary relief irrespective of intent to kill or indeed knowledge of the officer's status. (Pen. Code, § 1170, subd. (d); cf. Pen. Code, § 190.2, subd. (a)(7) [intentional murder of a police officer]; Pen. Code, § 664, subd. (e) [attempted murder of a person whom the defendant knows or should know is a police officer]; Pen. Code, § 190, subds. (b)-(c).)[10]

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[10] Persons who intentionally or knowingly shoot at a police officer are dangerous and deserve stiff punishment, but this is simply not appellant. Our legislature's blanket strict liability exclusion of police cases from limited statutory relief heightens the need for this Court to reach the substantive cruel and/or unusual punishment claims presented later in this brief. This defendant and others who want nothing to do with a cohort's senseless confrontation with police need appellate intervention.

Absent more specific development of the law in the wake of *Miller*, careful remand instructions (Pen. Code, § 1260) are urgently needed here and for the law generally if *Miller*'s true intent and meaning is to be respected. (See, e.g., ***People* v. *Murphy*** (2001) 25 Cal.4th 136, 159-160 [remand for resentencing with instructions to consider other issues noted by Court of Appeal].)

Accordingly, appellant respectfully requests remand with instructions that: (1) appellant be resentenced under section 190.5 without reference to any presumption and with further admonitions that (i) the court consider how children are different under *Miller* and how these differences counsel against imposition of LWOP and (ii) that appropriate cases for imposition of LWOP are uncommon and should be reserved for the rare juvenile offender whose crime reflects irreparable corruption; (2) after consideration of the factors noted in *Miller* (***Sen* v. *State***, *supra*, 2013 Wyo. LEXIS at **pp. 49-51), the court "set forth specific findings supporting a distinction between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption'" (***Sen* v. *State***, *supra*, 2013 Wyo. LEXIS at *p. 61); (3) the court consider the specific problematic comments implicating *Miller* noted by the Court of Appeal in this case; (4) the court consider the evidence of profound immaturity noted in this brief; (5) the court should not consider

bare chronological age without more as evidence of aggravation or special maturity; (6) the court should not treat appellant's age (at just under 18) as of "virtually nil" relevance under *Miller*; and (7) the court should also rule more fully and separately on both state and federal cruel and unusual punishment claims than occurred at this sentencing (with further instruction that the Court of Appeal's truncated discussion of the merits is not a controlling resolution of these issues). (Pen. Code, § 1260.)

Finally, based on the concerns expressed in *Roper* and *Cromer*, appellant respectfully requests the Court to remind the courts more generally to guard against overreaching (e.g., the newfound suggestions of intent to kill or presence at the shooting here contrary to previous appellate determinations), and of the need for robust independent review of the sometimes vague *Miller* factors and other sentencing factors.

IV. IMPOSITION OF A TERM OF LWOP ON APPELLANT CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FEDERAL CONSTITUTION AND, AT LEAST, THE CALIFORNIA CONSTITUTION.

A. INTRODUCTION.

For the reasons explained in Arguments I-III, and in the opinion of the Court of Appeal, *Miller* at a minimum requires a remand for resentencing. But this Court can and should reach substantive disproportionality claims on the merits as well. In appellant's view, a categorical bar (whether based upon state or federal grounds) on LWOP for juvenile homicide defendants who neither kill nor intend to kill would best respect, rationalize, and further the law in this area. At least, an as-applied disproportionality determination is sorely needed for this defendant, for other hapless accomplices in police cases, and to respect and rationalize the law and the results reached for all juvenile homicide defendants facing LWOP.

The issues of whether the LWOP term imposed constitutes cruel and/or unusual punishment are fairly included in the review petition and certainly within the case. (Cal. Rules of Court, rule 8.516(b)(1)-(2).) These issues strongly merit review both for this defendant and the development of the law after *Miller*. (See, e.g., ***People* v. *Brown*** (2012)

54 Cal.4th 314, 319 [reaching related legal issue raised in defendant's answer brief]; ***Farm Raised Salmon Cases*** (2008) 42 Cal.4th 1077, 1089, fn. 11 [even where (unlike here) Court of Appeal opinion did not mention the issue, record was sufficient for parties to fully brief the issue (as also occurred in the Court of Appeal here), permitting the Court to address the issue]; cf. ***Voice of the Wetlands* v. *State Water Resources Control Bd.*** (2011) 52 Cal.4th 499, 507-508 [Court declined to reach legal issue not raised in Court of Appeal because issue had been resolved on narrower factual grounds and thus did not present a significant question of statewide importance].)

In a decision presaging *Miller*, almost thirty years ago, a jury, trial judge, and a psychologist all perceived and expressed concerns over the immaturity of another 17-year-old armed felony murderer (and actual killer) facing trial as an adult for first-degree murder. (***People* v. *Dillon*** (1983) 34 Cal.3d 441, 483-486.) In reducing Mr. Dillon's term to second-degree murder, this Court likewise found that young man's immaturity, along with lack of a record showing hardened criminality, and the intersection of the defendant's immaturity with the felony murder rule, to be persuasive. (*Id.* at p. 488.)

After *Miller*, the concerns over such terms for youthful defendants based on their immature development now have become categorical, and the

concerns over felony-murder remain applicable. California law seeking to remedy these concerns is notably disparate and arbitrary as applied to this profoundly immature defendant.

In *Roper*'s terms, objective mitigation here is strong. As in *Dillon*, there is evidence of panic and real immaturity beyond chronological age; as in *Dillon*, the case presents a severe intersection of felony murder liability, immaturity, and absence of any indication of hardened criminality showing irredeemable criminality; as in *Enmund* (*infra*), appellant was not present when the killing occurred; this is no record of a hard-core juvenile gangster either. Further, appellant did not physically harm or attempt to harm anyone or discharge a weapon; his actions under stress towards two groups of police officers and a woman in her garage speak more loudly to the person before the court than competing experts, attorneys, or legal recklessness standards ever will; these actions under stress are considerably more than bare absence of intent to kill or lack of foreseeability to a getaway driver never tested during a confrontation. Unlike his almost suicidal codefendant, this young man knew exactly how dangerous it is to confront police when he heard these shots; found in a fetal position under a tree asking officers not to kill him, he comported himself better than a panicked Mr. Dillon did facing an armed pursuer.

Yet appellant will receive no consideration afforded: multiple

murderers under Penal Code section 1170, subdivision (d), since the victim was a police officer (the last sort of person appellant would confront); a 17-year-old murderer like Mr. Dillon; multiple attempted murderers like Mr. Caballero; armed robbers and other extremely serious nonhomicide and sex offenders under *Graham*; or indeed a Lockerbie terrorist recently afforded compassionate release in the event of terminal disease (Pen. Code, § 1170, subd. (e.)).

Despite the undoubted tragedy of this death, *Dillon* and now *Miller* teach that the tragic fact a death occurred does not justify any and all punishment on any and all defendants. The term imposed on appellant cannot be squared with *Miller*, *Dillon*, or a host of more serious juvenile offenders who will obtain relief. Remand for dueling experts, overreaching claims of intent to kill or encouragement based on GSR, inferences of maturity based on bare age contrary to *Roper*, and unreviewable conclusions based on vague factors like depravity is needless; after a lengthy trial and two sentencing hearings, there are no remaining material or supportable conflicts of historical fact warranting remand or deference here. If understandable, prudential piecemeal remand for further litigation is not appropriate here, for the sake of this defendant and others.

Miller left further development of the law to lower courts and legislatures. This Court is well within its constitutional function to develop

the law here as it did in *Caballero* and this is sorely needed. *Miller* is the law; it deserves respect and needs development; and if this Court agrees with its rationale (as it should and did in *Dillon*), this Court has every right to weigh in on the matter under *Dillon* and our state constitution as well.

Again, appellant believes a categorical ruling foreclosing LWOP for juvenile offenders who do not kill or intend to kill is appropriate under federal or state law alike, and would go a long way to rationalizing the law in this area. At least, an as-applied disproportionality ruling -- a *Dillon* for the 21st century of our harsher criminal law -- would serve as a needed floor in this area and is strongly merited for this defendant himself no less so than it was for Mr. Dillon.

B. CATEGORICALLY OR OTHERWISE, IMPOSITION OF LWOP ON THIS PROFOUNDLY IMMATURE JUVENILE FELONY-MURDER ACCOMPLICE WHO NEITHER KILLED NOR INTENDED TO KILL ANYONE VIOLATES THE EIGHTH AMENDMENT, *MILLER*, AND *MILLER*'S PREDECESSORS.

An offender's juvenile status imports significantly reduced culpability compared to adults and thus can play a *central role* in case-by-case proportionality review, not just categorical review. (***Graham* v. *Florida***,

supra, 130 S.Ct. at pp. 2038-2040 [Roberts, C.J., conc.].)[11] As noted, this Court has quoted *Miller* as broadly applicable to any juvenile criminal case (in the very same context of botched robberies involved here):

> "[N]one of what [*Graham*] said about children -- about their distinctive (and transitory) mental traits and environmental vulnerabilities -- is crime-specific. Those features [of youth] are evident *in the same way, and to the same degree*, when (as in both cases here) a botched robbery turns into a killing. So *Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile*, even as its categorical bar relates only to nonhomicide offenses."

(***People* v. *Caballero***, *supra*, 55 Cal.4th at p. 267 [quoting ***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2465] [emph. added].) The majority in *Miller* further reiterated its view stated in *Graham* that a juvenile who does not "'kill or intend to kill has a twice diminished moral culpability'" as "'compared to an adult murderer.'" (***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2468 [cit. om].)

Moreover, while the majority declined to reach categorical bars, a pointed concurrence takes pains to point out that, on remand, Mr. Jackson should not receive LWOP if the court finds that he neither killed nor

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[11] The federal gross proportionality analysis mirrors the state-law analysis which appellant applies in the next argument regarding *Dillon*. (See, e.g., ***Cacoperdo* v. *Demosthenes*** (9th Cir. 1994) 37 F.3d 504, 507-508.)

intended to kill (despite his awareness his confederate in a robbery was armed). (*Id.* at pp. 2475-2477 [Breyer & Sotomayor, conc.].) Signalled but not reached in the majority opinion as well as *Graham*, the concurrence adopts the *categorical* view that, unlike for adults, bare *Tison/Enmund* foreseeability of risk is *not* enough for juveniles who do not kill or intend to kill. (See *Id.* at p. 2475.)[12]

As Justice Breyer details, the logic of the *Graham* and *Miller* opinions inexorably supports a categorical ban on LWOP in these circumstances where it is conceded appellant did not kill or intend to kill anyone. "[R]egardless of our law with respect to adults, there is no basis for imposing a sentence of life without parole upon a juvenile who did not himself kill or intend to kill. [Felony-murder liability] is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet the *ability to consider the full consequences* of a course of action and to adjust one's conduct accordingly *is precisely what we know juveniles lack capacity to do effectively*." (***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2476 [cit.

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[12] ***Enmund* v. *Florida*** (1982) 458 U.S. 782, 801 [death penalty for getaway driver not present at killings held disproportionate]; ***Tison* v. *Arizona*** (1987) 481 U.S. 137, 152-158 [active participation under circumstances showing defendants subjectively appreciated their acts were likely to result in the taking of innocent life sufficient to support capital murder].)

om.] [emph. added].)[13] Grounded strongly in the nature of juveniles and the present facts alike, this categorical view should apply here.

Further, to explain the core difference between homicide and nonhomicide crimes *Graham* cites in part to ***Kennedy* v. *Louisiana*** (2008) 554 U.S. 407, 438 [128 S.Ct. 2641, 2660; 171 L.Ed.2d 525]. (***Graham* v. *Florida***, *supra*, 130 S.Ct. at p. 2027.) *Kennedy*, in turn, focuses squarely on the distinction between persons who kill or intend to kill versus persons liable for murder under vicarious felony murder principles -- *not* on *Tison* active participation/foreseeability elements. (***Kennedy* v. *Louisiana***, *supra*, 554 U.S. at pp. 437-438.) The actual killer/intent to kill line is a far more significant bright line than *Tison* active felony participation/foreseeability, which, especially as applied in practice in this state on vague foreseeability and incidental felony standards (CALCRIM Nos. 703, 730; ***People* v. *Harden*** (2003) 110 Cal.App.4th 848, 865), can apply to most felony murder accomplices in the virtual discretion of a court or jury.

This is a critical line because, even if a jury finds *Tison* satisfied, a

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[13] The *Tison* reckless disregard/major participation standards were applied here under the nonkiller felony murder special circumstance instructions. (14 CT 3821-3822 ["defendant knows or is aware that his acts involve a grave risk of death to an innocent human being"]; 31 RT 7040-7041; CALJIC No. 8.80.1.) But this nonetheless amounted to no more than foreseeability of a risk of death.

hapless felony murder accomplice who does not kill or intend to kill nonetheless evinces *far* less culpability than many premeditated attempted murderers and other grave offenses committed by actual perpetrators that do not happen to result in death. This is why, appellant submits, the *Graham* court signalled that defendants who did not "kill or intend to kill" have a categorically "twice diminished moral capability" -- without reference to *Tison*'s forseeability/active participation. (***Graham* v. *Florida***, *supra*, 130 S.Ct. at p. 2027.) This is a meaningful and helpful bright line that should be applied in categorical fashion here, as stated in the concurrence in *Miller*.

But even if this Court should decline to reach this helpful categorical bar, the facts here strongly support an as-applied determination of cruel and unusual punishment under the Eighth Amendment.

A marginal *Tison* foreseeability case for a felony-murder accomplice with no intent to kill -- especially one who was not present at a senseless killing and injured no one -- raises grave concerns under *Miller* and the cases discussed therein. (See, e.g., ***People* v. *Mendez*** (2010) 188 Cal.App.4th 47, 63-67 [in a nonhomicide case where juvenile robbery defendant using a firearm did not inflict injury, imposition of an effective LWOP represented a premature determination of irredeemable incorrigibility of the sort foreclosed by *Graham* for juvenile offenders];

Naovarath* v. *State (Nev. 1989) 779 P.2d 944, 945-949 [imposition of LWOP for juvenile murderer meant an unjustifiable denial of hope, requiring reduction to life with possibility of parole] [quoted in ***Graham* v. *Florida***, *supra*, 130 S.Ct. at p. 2027]; ***People* v. *Miller*** (Ill. 2002) 781 N.E.2d 300, 303-310 [imposition of LWOP upon nonkiller juvenile lookout was unconstitutionally disproportionate despite his awareness of codefendants' arming, requiring reduction to 50 years to life].)

Moreover, beyond a juvenile's difficulty in foreseeing codefendant's untoward actions, appellant's actions under stress and armed pursuit show *considerably* more about the person before the court than: (1) bare lack of proof of intent to kill; or (despite appellant's active participation in a separate robbery in another location) (2) bare lack of foreseeability to a getaway driver like the defendant in *Enmund* who was never tested by armed confrontation. Indeed, it was codefendant who spoiled an otherwise stealth/speedy getaway robbery M.O., calculated to avoid any armed confrontation appellant obviously did not want, by crashing the car and shooting the officer later. Before or after pursuit, appellant did not want an armed confrontation with anyone (and this is all the more clear if appellant was present at any time when officer Lasater approached him). Appellant would not merely have difficulty appreciating and foreseeing a shooting; he did not want one, especially with police; when he heard what

happened he harmed no one and knew better than to confront police.

Age 17 or not, like the 17-year-olds in *Graham*, *Roper*, and *Dillon*, a profoundly immature appellant falls squarely within the juvenile jurisprudence and his status as a juvenile imports significantly reduced culpability under proportionality analysis as well. Similar to appellant, the *Miller* majority even cites separation from parents and prior suicidal ideation, as well as the difficulty juveniles have in cooperating with police or attorneys (similar to an expert's concerns about appellant's ability to understand nonkiller felony-murder and participate in plea negotiations in this case). (***Miller* v. *Alabama***, *supra*, 132 S.Ct. at pp. 2468-2470; see also Argument I(A), *ante*; 1 RT 209; 34 RT 7589.)

While there was evidence appellant was something more than a driver, his participation viz-a-viz the person killed was still very different than cases like *Tison* or *Blackwell*. (See ***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2474-2475 [Breyer & Sotomayor, conc.]; cf. ***People* v. *Blackwell***, *supra*, 202 Cal.App.4th at pp. 144, 148-150, 156-159 [vacated and remanded for reconsideration after *Miller*] [very strong evidence (including admissions) defendant in residential robbery and killing of intended robbery victim was actual shooter].)

The fact this was a mandatory adult direct-file, and that precious little attention was afforded appellant's rote "priors" and personal history

at either sentencing here, add to the inference of disproportionality. (See ***Miller* v. *Alabama***, *supra*, 132 S.Ct. at p. 2473-2474; see also ***People* v. *Mendez***, *supra*, 188 Cal.App.4th at pp. 63-67 [record reflected a troubling lack of detail regarding defendant's history in a nonhomicide case where juvenile robbery defendant using a firearm did not inflict injury].)

Appellant's adult codefendant's untoward actions were tragic and hopefully uncommon, but, under *Miller*, appellant's felony-murder participation here is simply not "uncommon." Never previously sentenced to more than a boys' ranch or convicted of a violent felony, appellant does not present "the rare juvenile offender" for whom *Graham* or *Miller* would permit a determination of lifelong incorrigibility at the outset either. Despite the gravity of his codefendant's actions, appellant falls squarely within the broadly defined juvenile class of offenders subject to the *Miller* majority's pointed admonitions (including twice-diminished culpability for juveniles who do not kill or intend to kill), not just those of the concurrence offered in support of a categorical bar.

Further, setting aside indications of profound immaturity, the court's and prosecutor's reliance on crime planning and numerical age as reflective of supposed maturity appear flatly contrary to *Miller*'s admonitions juvenile brain science is *not* crime- or age-specific. (RT 74-76; CT 92-93.) The court's reliance on possible continued trauma to an *uninjured* victim appears

flatly contrary to the nonhomicide case of *Graham*, not just *Miller*. The court's characterization of an (undescribed) misdemeanor assault as a felony does not inspire confidence in the proceedings. With no disrespect intended, respondent's view appellant's age is of virtually nil relevance and the prosecutor's reaching suggestion of intent to kill do not augur well for remand in a high profile case either.

In sum, given the focus of the *Miller* admonitions on *broad juvenile status* (*not* a particular age or homicide crime), it is highly doubtful a defendant like appellant falls within the rare or uncommon offense or offender for which a court can constitutionally predict lifelong irredeemability. Bare arming or *Tison* foreseeability no longer warrants routine LWOP for juveniles. In any event, persons like appellant who neither kill nor intend to kill, were not present at the killing, and had no violent felony violations, gun priors, or CYA commitments do not fairly fall within *Miller*'s pointed (if not yet categorical) admonitions.

Other than the fact it was not necessary to decide the case, *Miller* did not explain why it did not apply a categorical bar for homicide cases despite its conclusion that the legal significance of juvenile status applies to all crimes equally. But in declining to reach the categorical issue, it did offer pointed admonitions to make sure LWOP would not be the norm even in homicide cases, and it did so for good reason. At the least, an unusual

combination of exceptional maturity, personal depravity, and possibly entrenched criminality is apparently needed. None of this is shown here. If experts cannot even reliability predict lifelong incorrigibility for anyone under eighteen (*Roper*), homicide alone is not enough (*Miller*), and an armed robbery alone is not enough (*Graham*), appellant does not merit LWOP under the Eighth Amendment if *Miller*'s attempts at admonitions short of categorical bars are to be respected.

Does any armed nonshooter participation in an all-to-common robbery gone bad really make out the uncommon case or rare offender because the defendant is almost eighteen, has a minor juvenile record, or helped plan the robbery? This makes out felony-murder liability for contributing to a needless death, but it does not satisfy or respect the import of our Supreme Court's attempts at admonitions for homicide cases. Nor does remand for application of respondent's view to consider standard aggravators going to felony-murder (not personal depravity) and age at seventeen (not personal maturity) as of "virtually nil" (RAOB 20) relevance. This is especially so for an immature juvenile with a minor record who attempted to harm no one when tested by pursuit.

Remand for further factfinding is not necessary on these facts and indeed would encourage patchwork compliance with our Supreme Court's attempts at admonitions. Reversal of the term of LWOP with instructions

to impose a total term that affords appellant a meaningful chance of release before expiration of his sentence is required. (***People* v. *Caballero***, *supra*, 55 Cal.4th at pp. 268-269.)

C. CATEGORICALLY OR OTHERWISE, IMPOSITION OF LWOP ON THIS PROFOUNDLY IMMATURE JUVENILE FELONY-MURDER ACCOMPLICE WHO NEITHER KILLED NOR INTENDED TO KILL LIKEWISE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER *DILLON* AND THE CALIFORNIA CONSTITUTION.

"'The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings.' [Citation.] Punishment which is so excessive as to transgress those limits and deny that worth cannot be tolerated." (***In re Lynch*** (1972) 8 Cal.3d 410, 424.) A sentence that is "grossly disproportionate" to the offense for which it is imposed, violates both the California constitutional prohibition against cruel or unusual punishment. (***People* v. *Dillon***, *supra*, 34 Cal.3d at p. 478; Cal. Const, art. I, § 17.)

In *Lynch*, the California Supreme Court identified certain "techniques" for evaluating a punishment to determine whether it is disproportionate. *Lynch* suggested that courts (1) examine the nature of the offense and/or the offender, (2) compare the challenged penalty with punishment prescribed in California for other, more-serious offenses, and

(3) compare the challenged penalty with punishments prescribed for the same offense in other jurisdictions. (***In re Lynch***, *supra*, 8 Cal.3d at pp. 425-427; see also ***Solem* v. *Helm*** (1983) 463 U.S. 277, 290-300.)

Proportionality among sentences meted out in homicide cases raises the greatest concern in the context of felony-murder liability. (***People* v. *Dillon***, *supra*, 34 Cal.3d at p. 477.) And, once again, the absence of intent to kill here augurs strongly in favor of a categorical bar for juveniles who neither kill nor intend to kill under our state's independent bar on cruel or unusual punishment as applied in *Dillon*.

Importantly, for a holding of disproportionality, the court need not find the punishment disproportionate in all three respects. Rather, a finding of disproportionality based on *any* of the *Lynch* criteria will suffice. (***People* v. *Dillon***, *supra*, 34 Cal.3d at p. 487, fn. 38; ***In re DeBeque*** (1989) 212 Cal.App.3d 241, 249; see also ***People* v. *Mendez***, *supra*, 188 Cal.App.4th at p. 67.)

Here, as in *Dillon*, appellant focuses on the first prong of the analysis. Nonetheless, under the second prong, the fact that *equally* severe LWOP terms (and less severe terms for non-special circumstance murder) are imposed in this state for far more serious premeditated and aggravated murders is just as relevant here as it was in *Dillon*. (***People* v. *Dillon***, *supra*, 34 Cal.3d at p. 487, fn. 38.) "[A] carefully planned murder

executed in cold blood after calm and mature deliberations" is "the most aggravated form of homicide known to our law." (*Id.* at p. 487.) *Yet cold-blooded premeditation does not subject a killer to LWOP*, but only to the base first-degree murder punishment of 25-to-life. Premeditation is not a special circumstance in its own right, nor is use of a firearm or other weapon.[14] A premeditated murder is subject to LWOP only if some other aspect of the killing brings it within one of the special circumstance categories, such as use of poison or an explosive or killing of a law enforcement officer. (Cf. Pen. Code, § 190.2, subd. (a).) As this Court is aware from the homicides on its docket over the years, most premeditated killings are *not* charged and punished as special circumstance murder.

In applying the second *Lynch-Dillon* factor, "it is also instructive when [the current offense] is punished *as* severely as a more serious crime." (***People* v. *Dillon***, *supra*, 34 Cal.3d at p. 487, fn. 38 [emph. in orig].) That too is true here. Appellant's punishment is equal to that for all other forms of special circumstance murder. Yet most of those

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[14] Even if the premeditated murderer personally shoots and kill the victim (Pen. Code, § 12022.53, subd. (d)), the aggregate punishment (50 years to life) would still be less than LWOP. Unlike appellant's punishment, 50-to-life would still hold out the possibility of parole within a juvenile offender's life expectancy.

categories involve dramatically greater culpability than appellant's offense, such as torture, use of a destructive device, murder-for-hire, multiple murders, or murder to obstruct law enforcement or the judicial process, such as killings of judges, prosecutors, witnesses, or police officers. (Pen. Code, § 190.2, subd. (a).) Even among felony-murders, appellant's theft-related predicate felony, while serious, involves far less inherent violence, cruelty, or callousness than many of the other qualifying offenses, such as mayhem, rape, child molestation, kidnapping, arson, or train-wrecking. (Cf. Pen. Code, § 190.2, subd. (a)(17).)

Further, under the third prong, while several states authorize such terms for homicides, the statistics regarding actual imposition of such terms for juveniles who neither kill nor intend to kill (or are not present at the killing) are unclear, and the clear trend internationally and even in states such as Alaska, Colorado, Montana, Kansas, Kentucky, and Texas is to the contrary. (***Graham* v. *Florida***, *supra*, 130 S.Ct. at pp. 2033-2036; CT 71-72.) As this Court has recently demonstrated, international law may help inform this Court's assessment of the human rights standards that guide its construction and application of the protections of the California Constitution. (See ***In re Marriage Cases*** (2008) 43 Cal.4th 757, 818, fn. 41.)

Juvenile LWOP is virtually unknown outside this country. As

discussed in *Graham*, a recent study concluded that "only two" nations in the world, "the United States and Israel, ever impose the punishment in practice [citation]," and "[a]n updated version of that study" indicated that the latter country's sentences were not true LWOPs, because Israel's laws allow for parole review. (***Graham* v. *Florida***, *supra*, 130 S.Ct. at p. 2033.) Juvenile LWOP is repugnant to international human rights covenants. "Article 37(a) of the United Nations Convention on the Rights of the Child [citation], ratified by every nation except the United States and Somalia, prohibits the imposition of "life imprisonment without possibility of release ... for offenses committed by persons below eighteen years of age." (*Id.* at 2034.) While that covenant is not "binding or controlling" on California, this Court should consider "the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency" (*ibid.*) in giving effect to our state constitutional prohibition on "cruel or unusual punishment" (Cal. Const., art. I, § 17).

Indeed, international human rights law provides much stronger and more explicit guidance on the "cruel or unusual" character of juvenile LWOP than it did on the specific equal protection issue in *Marriage Cases*. There is a firm and explicit "international consensus" against juvenile LWOP. (***Graham* v. *Florida***, *supra*, 130 S.Ct. at p. 2034.)

Turning now to the first prong, a comparison of the facts here with

Dillon, in which a first-degree felony murder term for a young and immature 17-year-old who shot a man to death in a robbery-gone-bad was found to be excessive, is compelling. (***People* v. *Dillon***, *supra*, 34 Cal.3d at pp. 451-452, 482-489.) But for codefendant's senseless shooting, the personal gun conduct and histories of the defendants in cases like *Graham* and *Mendez* is also strikingly similar to appellant's. These more recent cases breathe new life into *Dillon* and its application here.

In *Dillon*, the defendant, age 17, armed himself with a rifle and, along with other armed companions, committed a premeditated robbery raid on a marijuana growing operation. (***People* v. *Dillon***, *supra*, 34 Cal.3d at pp. 451-452, 482-489.) Dillon anticipated resistance and the group had discussed hitting the victim over the head. (*Id.* at pp. 451-452.) When he saw the victim approaching with a shotgun, Dillon shot the man nine times, killing him. (*Ibid.*)

Despite the seriousness of the offense, this Court concluded a term for first-degree murder, premised upon felony murder, was excessive for this offense and offender; thus, the court modified the term imposed to the term for second-degree murder. (*Id.* at pp. 482-489.) Even though the killing was intentional (*Id.* at p. 486), the Court stressed that Dillon was young and immature, he shot in panic without thinking in response to opposition from the victim, he had no prior record, and was not the

prototype of a hardened criminal. (*Id.* at pp. 482-489.)

Dillon's panicked response to armed confrontation is strikingly similar to appellant's (except that appellant did not discharge his weapon and knew better than to confront police). This Court's analysis of the intersection of panic, juvenile immaturity, and felony-murder is likewise strikingly similar to the rationale of *Miller* and its predecessors. Although Dillon "largely brought the situation on himself," "there is ample evidence that *because of his immaturity he neither foresaw the risk* he was creating *nor was able to extricate himself without panicking* when that risk seemed to eventuate." (*Id.* at p. 487 [emph. added].)

At the time of *Dillon*, the special circumstance statutes applied only to adult defendants. (***People* v. *Spears*** (1983) 33 Cal.3d 279.) Consequently, "[b]ecause of his minority no greater punishment [than 25-to-life] could have been inflicted on defendant if he had committed the most aggravated form of homicide known to our law -- a carefully planned murder executed in cold blood after calm and mature deliberations." (***People* v. *Dillon***, *supra*, 34 Cal.3d at p. 487.) Only in 1990 did California expose 16- and 17-year offenders to the far greater punishment of life imprisonment without possibility of parole. (Pen. Code, § 190.5(b), as amended by Prop. 115, eff. June 6, 1990.) Since that time, this Court has never had occasion to decide a state "cruel or unusual punishment"

challenge to an LWOP term for a juvenile homicide.

Miller's discussion of the developmental and psychological factors that diminish the culpability of juvenile offenders provides, especially those who do not kill or intend to kill, provide cause for re-examination of the constitutionality of juvenile LWOP under state, as well as federal law. In appellant's view, a categorical rule for juveniles who neither kill nor intend to kill based on exactly the same concerns expressed in *Miller* and *Dillon* is strongly supported and sorely needed as a matter of state law in the context of juvenile LWOP. In any event, application of the three *Lynch* factors to petitioner's LWOP sentence provides an even more compelling case for a finding of disproportionality than the lesser 25-to-life term found excessive in *Dillon*.

Dillon's discussion of the nature of the homicide is equally relevant here. The felony-murder special circumstance, like the underlying felony-murder rule, sweeps in numerous offenders whose actual conduct and mental state would not otherwise support first-degree murder liability (or, in some cases, would not support murder liability in any degree):

> First degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic

> or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

(***People* v. *Dillon***, *supra*, 34 Cal.3d at p. 477.)

Dillon found the 25-to-life punishment there excessive, even though the 17-year-old offender was the actual killer (firing 9 times) and acted with specific intent to kill. (*Id.* at 452, 489.) Under that sentence, Dillon would still have come up for parole consideration sometime in his 40's or probably earlier.[15] Plainly, there is a far more grievous mismatch between individual culpability and the punishment, where a teenager is faced with serving the rest of his life in prison, with no opportunity for parole consideration in light of his maturation and rehabilitation. Indeed, as the U.S. Supreme Court observed in *Graham* and *Miller*, LWOP for a youthful offender is actually a more onerous punishment than for an adult defendant because, by virtue of entering prison at a younger age, the minor will serve a greater number of years and a greater proportion of his life behind bars. (***Graham* v. *Florida***, *supra*, 130 S.Ct. at p. 2028; ***Miller* v. *Alabama***,

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[15] Under then-applicable regulations, "defendant face[d] a base term of 14, 16, or 18 years [citations], plus 2 additional years for use of a firearm [citation]." (*Id.* at p. 487 fn. 37.) Moreover, at that time, inmates serving murder terms were still able to earn conduct or worktime credits. (Cf. § 2933.2 (enacted in 1996; barring worktime or conduct credits against murder sentences).)

supra, 132 S.Ct. at p. 2468.)

Here, appellant's armed robbery conduct was far less serious than Dillon's shooting and appellant's age, profound immaturity, and panicked response to armed confrontation are pointedly comparable. Importantly, this is so despite his record as reflected in a few rote entries in a probation report (quite similar to Mr. Graham's record), the most serious of which was mischaracterized by the trial court as an assaultive felony.

Appellant notes Mr. Dillon, too, had obvious interest in and accessibility to guns (not just BB guns) and marijuana. In this more heavily policed day and age, Mr. Dillon very well might have had drug priors similar to appellant's even in a rural area, not to mention if he lived in a high-patrol urban neighborhood. In any event, appellant's "fight," BB gun assault, and drug-related offenses, not resulting in so much as a CYA commitment, just do not fairly make him out a hardened criminal compared to Mr. Dillon or hard-core juvenile gang members; they make him out a teenager in a more heavily policed place and time. No more so than similar priors in *Graham*, they certainly do not make him the rare depraved offender noted in *Miller* for whom a court can reliably predict lifelong incorrigibility at the outset.

Indeed, appellant's own overall personal current conduct -- and his past juvenile record -- are strikingly similar to Mr. Graham's (***Graham* v.**

Florida, *supra*, 130 S.Ct. at pp. 2018-2019) and far less serious than Mr. Dillon's and many shooting cases not resulting in death. His involvement with drugs and guns and one robbery is similar to Mr. Dillon's. Neither Dillon's nor appellant's teenage involvements (including showing off a gun once at school recently; 25 RT 5790, 5804-5811) bespeak hardened gang involvement or criminality. Even teens involved with more violent incidents in gang culture can and do get out, move, and mature; people like appellant, Mr. Graham, or Mr. Dillon certainly could.

And, as noted, if appellant was the ringleader, his entire M.O. and conduct bespeak a very different disposition towards gun violence than either Mr. Dillon or the codefendant here; if Dillon's immaturity reflected impulsive reaction and panic in firing his weapon during an in-concert armed robbery gone bad, appellant's action in fleeing, *not* shooting anyone, and lying under a tree in a fetal position reflect the very same thing.

Appellant is entitled to no less consideration under the law than: a young man who lived in the rural Santa Cruz mountains, namely Mr. Dillon; a young man in Florida with strikingly similar personal robbery conduct and history, namely Mr. Graham; a young man in California involved in very similar personal robbery conduct, namely Mr. Mendez; or a young man in California involved in far more violent gun conduct, namely Mr. Caballero. And again, even before *Miller*, the distinction

between LWOPs, which afford no hope of release or rehabilitation, and lesser servable determinate terms, remains significant for obvious reasons. (See, e.g., ***In re Lynch***, *supra*, 8 Cal.3d at p. 426; ***Solem* v. *Helm*** (1983) 463 U.S. 277, 287, 297; cf. ***Lockyer* v. *Andrade*** (2003) 538 U.S. 63, 72 & fn. 1 [123 S.Ct. 1166, 1174, fn. 1; 155 L.Ed.2d 144].) As appellant's mother (and many others; 17 CT 4622) urged, at some point the courts must distinguish between offenders who merit parole consideration within their lifetime and those who do not. The point is all the more persuasive in the context of juvenile offenders after *Graham* and *Miller* and state cases like *Mendez* and *Caballero*. Whether as a matter of state or federal law, appellant urges the Court to make this distinction here.

In sum, under the circumstances, the term imposed on this still-maturing young man is every bit as excessive as the terms imposed upon Mr. Dillon, Mr. Mendez, or Mr. Graham (also an armed robber just under 18 with no record beyond juvenile probation; ***Graham* v. *Florida***, *supra*, 130 S.Ct. at pp. 2018-2019). A few sparsely described juvenile violations in a probation report do not change this. Especially in a high-profile case, the Court should not relegate appellant to future political/legislative vagaries, or discretionary resentencing in such a close-knit legal, law enforcement, and local community when the term imposed is demonstrably cruel and unusual.

Given the stark similarities between this case and *Dillon*, reversal and remand with instructions to reduce appellant's murder term to second degree murder as in *Dillon*, or at a minimum to first-degree murder (Pen. Code, § 190.5), provided the court further determines the total term affords appellant a meaningful chance of release within his predicted life expectancy given credits limitations, as set forth in *Caballero*, is required.

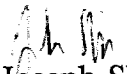
V. IF SOMEHOW THE COURT OF APPEAL ERRED IN REMANDING ON THE SECTION 190.5 ISSUES, REMAND TO THE COURT OF APPEAL IS REQUIRED.

Contrary to respondent (RAOB 30), if somehow the Court of Appeal erred in remanding on the section 190.5 issues, reinstatement of LWOP is still not the proper remedy. Due process and the interests of justice plainly require remand for the Court of Appeal to: address appellant's separate arguments regarding abuse of discretion and other constitutional challenges to section 190.5 as applied here; and indeed to rule more fully on both state and federal disproportionality challenges beyond the passing discussion of categorical claims (a discussion which the Court of Appeal plainly truncated in light of its determination to remand for resentencing). (Cal. Rules of Court, rule 8.528(c); Pen. Code, § 1260; U.S. Const., amends. V, XIV; Cal. Const., art. I, §§ 7, 15.)

CONCLUSION

For all of the foregoing reasons, the term of LWOP must be reduced to first- or second-degree murder and the cause remanded with instructions to resentence appellant as specified in *Caballero*. At a minimum, the cause must be remanded for resentencing with careful instructions consistent with the arguments set forth above.

Respectfully Submitted,



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WORD COUNT CERTIFICATION

By my signature below and on the attached proof of service for this brief, I, Joseph Shipp, counsel for appellant, hereby certify, under penalty of perjury as specified in the proof of service appended hereto, that the body of the brief herein, exclusive of tables and appendices, contains 13951 words, as determined by the word count function of the word processing program used to prepare the brief.

Joseph Shipp
Counsel for Appellant

DECLARATION OF SERVICE

Re: *People* v. *Moffett* No. S206771

I, Joseph Shipp, declare that I am over 18 years of age, and not a party to the within cause; my employment address is Post Office Box 20347, Oakland, California 94620. I served a true copy of the attached: APPELLANT'S ANSWER BRIEF on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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Joseph Shipp
Declarant