IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ALBERT ARZATE and JOHNNY MENDOZA,** Defendants and Appellants.	Case No. S238032 Court of Appeal No. B259259 Superior Court No. BA396381

FROM THE JUDGMENT OF THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES, THE HONORABLE BOB S. BOWERS, JUDGE PRESIDING

APPELLANT MENDOZA'S OPENING BRIEF ON THE MERITS

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INTRODUCTION

Appellant is now one of approximately 289 juveniles serving a sentence of life without the possibility of parole (LWOP) for crimes they committed as children.[1] Appellant was 17 years old when he aided and abetted his friend and fellow gang member, 18-year-old, Albert Arzate in the first degree murder of two men, the attempted murder of a third man, and an assault with a deadly weapon on a young woman. A jury found appellant and Arzate committed multiple murders, that the murders were committed while appellant was an active participant in a street gang, and while the defendants were lying in wait. At the sentencing hearing

[1] See Petitioner's Brief on the Merits, Appendix A, *In re Kirshner* (2016) Case No. S233508, showing that as of October, 2015, 289 juveniles in California were serving sentences of LWOP. See also, Mills, Dorn, Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, (2016) 65 Am. U.L. Rev. 535, Appendix A, establishing that as of July 8, 2015, 288 juveniles were serving LWOP and 112 were from Los Angeles County. These are the most recent statistics generally available.

on October 8, 2014, the trial court disagreed with defense counsel's position that under *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*), a juvenile offender is presumed to be immature with diminished culpability and a greater capacity for change, found that appellant failed to present any evidence relevant to the factors in *Miller*, and concluded that a sentence of life without the possibility of parole "would not raise an inference of gross disproportionality under the Eighth Amendment when taken into consideration with the factors [*Miller* factors] previously mentioned." (16RT 6636.) The Court of Appeal upheld this decision.

The Eighth Amendment prohibits sentences of life without the possibility of parole for all but the *rarest* of juvenile offenders whose crimes reflect *permanent incorrigibility or irreparable corruption*. (*Montgomery v. Louisiana* (2016) 577 U.S. ___ [136 S.Ct. 718, 193 L.Ed.2d 599] (*Montgomery*).) Because the Supreme Court has unequivocally concluded that a sentence of life without the possibility of parole is disproportionate for the vast majority of juveniles who commit murder, there is a presumption against such a sentence. This presumption was not applied or overcome in appellant's case, and thus, his sentence violates the Eighth Amendment.

Nothing about appellant or the crimes he aided and abetted demonstrate that he is the rarest juvenile offender who is irreparably corrupt or permanently incorrigible and the trial court made no such finding. It is not enough for a trial

court to simply consider the *Miller* factors, weigh them against the facts of the crime, and conclude that a sentence of life without the possibility of parole is not "disproportionate," as the court did here. Rather, the court must consider the *Miller* factors and use those factors to separate the rare juvenile offender who may be sentenced to life without the possibility of parole from the juvenile who may not receive such a sentence by determining whether the juvenile's crime reflects irreparable corruption or permanent incorrigibility. Reversal of the Court of Appeal's decision is required.

ISSUES PRESENTED FOR REVIEW

Did *Montgomery v. Louisiana, supra,* 577 U.S. ___ [136 S.Ct. 718, 193 L.Ed.2d 599] clarify that *Miller v. Alabama, supra,* 567 U.S. ___ [132 S.Ct. 2455, 183 L.Ed.2d 407] created a presumption against a sentence of life without the possibility for parole for juvenile offenders and requires trial courts to determine that a juvenile offender is one of "those rarest children whose crimes reflect irreparable corruption" (*Montgomery*, at p. ___ [136 S.Ct. at p. 734] before imposing such a sentence? Or is it sufficient, for purposes of compliance with *Montgomery* and *Miller*, that a trial court take into consideration the offender's youth and attendant circumstances in exercising its sentencing discretion under Penal Code section 190.5, subdivision (b)?

SHORT ANSWERS

Yes, the Supreme Court in *Montgomery v. Louisiana* clarified that *Miller v. Alabama*, created a presumption against a sentence of LWOP for juveniles who commit murder. In concluding that *Miller* created a new substantive rule of constitutional law, the *Montgomery* court noted that while *Miller* did not bar LWOP punishment for all juvenile offenders, it did "bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." (*Montgomery, supra*, 136 S.Ct. at p. 734.) The Court explained that before *Miller*, every juvenile convicted of a homicide could be sentenced to LWOP, but after *Miller* it "will be the rare juvenile offender who can receive the same sentence," and reiterated that such sentences will be "uncommon." (*Ibid.*) Thus, the presumed sentence for a juvenile convicted of homicide includes parole eligibility.

Yes, pursuant to *Montgomery*, the trial court must determine that a juvenile is one of the rarest of offenders whose crime reflects irreparable corruption or permanent incorrigibility, as opposed to transient immaturity, before sentencing a juvenile to LWOP. Simply, considering the juveniles's youth and attendant circumstances in exercising its sentencing discretion under Penal Code section 190.5, subdivision (b) is not sufficient under *Montgomery* and *Miller*. The *Montgomery* Court stated, "Even if a court considers a child's age before

sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate, yet transient immaturity." (*Montgomery, supra*, 136 S.Ct. at p. 734.) Thus, the "sentencer must decide whether the juvenile offender before it is a child 'whose crimes reflect transient immaturity' or is one of those 'rare children whose crimes reflect irreparable corruption' for whom a life without parole sentence may be appropriate." (*Tatum v. Arizona* (2016) __ U.S. __ [137 S.Ct. 11, 12-13, 196 L.Ed.2d 284], Sotomayor, J., concurring in the Court's decision to grant certiorari.)

STATEMENT OF THE CASE

Charges and Verdict:

An Information charged appellant and Arzate with the September 25, 2010 murders of Samuel and Jose Martinez (Pen. Code §187), the attempted murder of Marvin G. (Pen. Code §§ 664/187), and the September 24, 2010 assault of April S. with a firearm (Pen. Code §245 (a)(2)). It was alleged that appellant and Arzate intentionally killed Samuel and Jose Martinez while active participants in a street gang (Pen. Code § 190.2(a)(22)), committed multiple murders (Pen. Code § 190.2 (a)(3)), and the murders were committed while lying in wait (Pen. Code § 190.2 (a)(15)). (3CT 628.) The Information further alleged that a principal personally used and discharged a firearm (Pen. Code §§ 12022.53 (b)-(e), 12022.5). It was further alleged that appellant was at least 14 years of age at the time of the

offenses within the meaning of Welfare and Institutions Code section 707, subdivisions (d)(2)(A) and (d)(2)(C)(ii). (3CT 630.)

The prosecution's theory was that appellant aided and abetted Arzate in each of the charged crimes. (14RT 4657, 4668.)

A jury found appellant guilty of first-degree murder in Counts 1 and 2. (1SCT 133, 136; 16 R.T. 5414-5417.) The jury found each of the special circumstances allegations true, that the murders were committed for the benefit of a street gang (Pen. Code § 186.22 (b)(1)(C)) and that appellant was over 14. (1SCT. 133-137; 16RT 5415-5419.) As to appellant, the jury found not true the allegations that a principal personally used and discharged a firearm. (1SCT 133, 136; 16RT 5414-5418.) The jury found appellant guilty as charged in Counts 3 and 4, found the crimes were committed to benefit the gang, but found the firearm allegations not true. (1SCT 139-141; 16RT 5420-5424.)

Sentencing Proceedings:

Prior to sentencing, defense counsel, relying on *Miller v. Alabama, supra*, 132 S.Ct. 2455 and *People v. Gutierrez* (2014) 58 Cal.4th 1354, filed a request to impose a sentence of less than life without the possibility of parole, arguing that evidence to be presented at the sentencing hearing would establish that the crime and appellant's background "justify a grant of leniency." (1SCT 181-187.) The prosecution filed an Opposition, arguing that a sentence of LWOP was proper

because appellant "should be categorized as part of the juvenile offender [sic] who reflects 'irreparable corruption' due to his violent crime and choice of gang lifestyle." (1SCT 192-195.)

At the beginning of the sentencing hearing, the court noted that based on *Miller, supra*, 132 S.Ct. 2455, it had to consider the "defendant's attribute[s] with respect to maturity, immaturity, capacity for change and what has also been alluded to as the distinct attributes of youth." (16RT 6615.) Defense counsel indicated that he planned to call Daniel B. Vasquez, a former prison Warden and rehabilitation expert, to testify about programs available in the prison to assist with rehabilitation and the operations of the parole board in determining suitability for parole. (16RT 6616.) In response, the court noted that, while it would listen to Mr. Vasquez, such an expert "does not help me make a determination regarding your client's suitability one way or the other as to whether he falls within the parameters of *Miller*." (16RT 6616.) Defense counsel explained:

> it is presumptive under *Miller v. Alabama* that a defendant who is the same age as my client has a mental capacity to judge and analyze a situation is such [sic] that it is not fully formed, the court has ruled that. The court has ruled that a juvenile's executive functions are presented to be not that of an adult.

(16RT 6617.) Therefore, counsel argued that under *Miller*, the "overriding issue" was whether there is an ability for appellant to rehabilitate in prison. (16RT 6617.) The trial court disagreed with counsel's interpretation of *Miller*. (16RT 6617-

6618.)

Counsel thereafter presented the testimony of Vasquez and submitted a copy of Vasquez's report to the court. (16RT 6619.) For 30 years, Vasquez worked for the California Department of Corrections and Rehabilitation as a correctional officer, classification parole representative, program administrator, parole officer, Associate Warden and Warden. (16RT 6620-6621.) When defense counsel tried to ask Vasquez about the rehabilitative programs offered and the facts a parole board takes into consideration when determining whether to grant parole, the court sustained the prosecutor's relevance objections. (16RT 6622.) The court stated:

> I need information on why this gentleman believes that your client, Mr. Mendoza, poses a threat or in the future would not pose a threat and so on. And that's what I need to know. I know the structure, I know how the parameters [sic], but how is your client fit? I need specific information to assist me in coming to a conclusion about Mr. Mendoza.
> . . .
> What I am saying right now, that's the kind of information I need as to, as to an expert's opinion as to somebody's amenability for example. (16RT 6623.)

Vasquez then testified that there are programs available in state prison to assist with rehabilitation, and that individuals who do not demonstrate rehabilitation and who pose a risk to society are not released on parole. (16RT 6625-6626.) Based on the trial court's relevance rulings, defense counsel abruptly stopped his questioning of Vasquez. (16RT 6627.)

Defense counsel then argued that appellant had been in custody for three years and was in the general population which shows rehabilitation, appellant did not engage in gang activity in the county jail, there was evidence appellant had been drinking on the night of the offense, and appellant was not the direct perpetrator. (16RT 6627-6628.) The prosecutor argued appellant was not immature, knew what he was doing, manipulated the interview with police after his arrest, continued his gang activity in jail, and had not demonstrated remorse. (16RT 6631-6632.)

The court denied appellant's request to be sentenced to less than life without the possibility of parole. The court stated:

> Number 1, these offenses were committed with at least one adult codefendant. However, the codefendant's age was 18 years, 8 months and 24 days.
> Two, the evidence presented did not demonstrate or point to, with any specificity, that the defendant had insufficient adult support of supervision and had suffered from psychological or physical trauma or significant stress.
> Three, the evidence presented did not demonstrate or point to, with any sufficient specificity, that the defendant suffers from cognitive limitations due to mental illness, developmental disabilities or other factors that did not constitute a defense but influenced the defendant's involvement in the offenses.
> There was no evidence presented regarding capacity for change.
> The court further finds, for purposes of this analysis and ruling[2]:
> One, that the crimes involved great violence, great bodily harm,

[2] The following factors relied on by the court are the aggravating factors related to the crime as set forth in Rule 4.421, subdivision (a) of the California Rules of Court.

> threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness and callousness.
> Two, the victims were particularly vulnerable.
> Three, the defendant was not induced to commit or assist in the commission of these crimes.
> Four, the defendant threatened a witness, dissuaded a witness, thus interfering with the judicial process.
> Five, the manner in which the crimes were carried out indicates planning, sophistication and professionalism.
> The court notes that, in its opinion, these were senseless crimes on behalf of a street gang.

The court added:

> Therefore, or thus, this court, after having considered all the circumstances, that if a sentence of LWOP is imposed, such sentence would not raise an inference of gross disproportionality under the Eighth Amendment when taken into consideration with the factors previously mentioned.
> Therefore, the defense motion to have Mr. Mendoza sentenced other than LWOP or life without the possibility of parole is denied. (16RT 6633-6636.)

The Court thereafter sentenced appellant to two consecutive LWOP terms plus 18 years. (16RT 6638-6641.)

The Appeal:

On appeal, appellant argued, in relevant part, that the Supreme Court's decision in *Miller*, established a presumption against imposing an LWOP sentence for child offenders, and that appellant's consecutive sentences of life without the possibility of parole violate the Eighth Amendment and are inconsistent with

Miller.[3] The Court of Appeal upheld appellant's conviction and sentence in an unpublished decision. With respect to appellant's consecutive terms of LWOP, the Court of Appeal, relying on *People v. Palafox* (2014) 231 Cal.App.4th 68, 91, concluded that *Miller* "did not establish a presumption against juvenile life without the possibility of parole," but rather, requires only that "a sentencer follow a certain process - considering an offender's youth and attendant characteristics - before imposing a particular penalty." (Opinion, pp. 39-40.) The Court found that, as long as the trial court "gives due consideration to an offender's youth and attendant characteristics, as required by [*Miller*], it may, in exercising its discretion under Penal Code section 190.5, subdivision (b), give such weight to the relevant factors as it reasonably determines is appropriate under all of the circumstances of the case." (Opinion, p. 40.)

The Court further found that since defense counsel did not offer any evidence "concerning any adverse factors in his family and home environment, or how familial and peer pressure may have affected his participation in the crime, or of substance abuse," counsel "determined that there was no appropriate evidence

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[3] With respect to appellant's sentence, he further argued: (1) he was entitled to a jury trial on the issue of whether he was one of the rare juveniles who is irreparably corrupt and thus, subject to a sentence of LWOP, (2) his sentence violated the state constitutional prohibition against cruel and unusual punishment, and (3) he was denied his right to the effective assistance of counsel at the sentencing hearing when trial counsel failed to present evidence in his possession relevant to the *Miller* factors.

to proffer," and that the trial court properly considered appellant's role in the offense, his interrogation by officers, his age, and "thoughtfully weighed the appropriate factors . . . and implicitly concluded defendant was unfit ever to reenter society." (Opinion, pp. 42-43.) Finding the trial court considered the *Miller* factors, the Court of Appeal held that the court did not abuse its discretion under Penal Code section 190.5. (Opinion, p. 43.)

This Court granted review on this issue.

As will be demonstrated below, the Court of Appeal's decision in this case, and the decision on which it relies, *People v. Palafox, supra*, 231 Cal.App.4th 68, 91, are incorrect and contrary to the United States Supreme Court decisions in *Miller* and *Montgomery*. The trial court failed to apply the presumption against sentences of life without parole, failed to hold the prosecutor to its burden of overcoming the presumption, and failed to make the finding required by *Miller* and *Montgomery*, namely, that appellant is one of the "rarest juveniles" who is "permanently incorrigible or irreparably corrupt." Thus, reversal of appellant's sentence is required and the matter should be remanded for a *Miller* hearing wherein the court applies the presumption against LWOP, holds the prosecution to its burden, permits appellant the opportunity to rebut any evidence presented by the prosecution, and makes a finding whether appellant is one of the vast majority of juveniles who is transiently immature or whether he is one of the rarest of juvenile

offenders who is irreparably corrupt or permanently incorrigible.

STATEMENT OF FACTS

Appellant was 17 years old when he aided and abetted Albert Arzate in this offense. (16RT 6615.) It was undisputed that Arzate, who was 18 years old, was the shooter. (16RT 6633-6634.)

Appellant and Arzate were members of Cypress Park gang on September 24, 2010. (6RT 1873; 8RT 2736, 2780-2781; 11RT 3712-3713.) Appellant had been contacted by police in the presence of other Cypress Park gang members between 2007-2010 and admitted being a member of the gang. (3RT 982, 987-988, 990; 8RT 2736, 2859, 2766-2768, 2772, 2773-2779, 2861-2864; 11RT 3700.) Appellant, however, had no gang related tattoos (5RT 1553;11RT 3700-3701) and, according to the Probation Report, had no prior juvenile adjudications (1SCT 241). Arzate, on the other hand, was covered with gang related tattoos, including several obtained in custody while awaiting trial, and had numerous prior juvenile adjudications. (5RT 956; 6RT 1873; 8RT 2910-2911; 10RT 3328; 11RT 3675-3676.)

On September 24, 2010, appellant and Arzate went to a fellow gang member's home where they encountered April S., who was in a relationship with Cypress Park gang member, Husky Flores. (4RT 1243-1244.) Appellant had a three-foot-long gun inside his pants. (4RT 1287, 1322-1323, 1325-1326.) At

some point, Arzate made a comment to April, insinuating that she was cheating on Flores with a member of the rival Avenues gang. (4RT 1268-1269; 5RT 1516, 1567; 6RT 1915; 12RT 3941-3942.) April took offense, yelled at Arzate and followed appellant and Arzate as they walked toward the front of the property to leave. (4RT 1272, 1276; 5RT 1528, 1530-1531; 6RT 1816, 1904-1906; 7RT 2142, 2144; 12RT 3941, 3944, 3954.) As they got to the corner of the front house, Arzate pointed the shotgun, which had previously been in appellant's pants, at April's face, cocked the gun, and said, "Now what, bitch." (4 R.T. 1277, 1280-1283-1284, 1289; 5RT 1525-1526; 6RT 1911; 7RT 2165, 2167; 12RT 3944-3945.) Appellant stood next to Arzate, but did not do or say anything, even when April asked appellant how he could let Arzate "do that" to her. (4RT 1282-1283; 6RT 1975.) Appellant and Arzate left the property. (4RT 1286-1291.)

Later on the evening of September 24 or in the early morning hours of September 25, about 10 blocks away from where April was assaulted, and in the "main thoroughfare" of Avenues' gang territory, brothers Jose and Samuel Martinez and their cousin, Marvin G., walked to the liquor store to buy chips and beer. (9RT 3044-3045, 3118; 11RT 3653.) On their way back to the Martinezes' home, appellant and Arzate, popped out of the darkness of a wall by a driveway and onto the sidewalk. (9RT 3053-3054, 3099-3100, 3118.) Appellant and Arzate asked the group, "Where you from," and then Marvin heard one of his cousins

scream, “no.” (9RT 3056, 3122.) Marvin saw Arzate holding a shotgun, heard three or four gunshots, and then ran and hid by a champagne colored four door vehicle, where he was struck by a gunshot. (9RT 3057, 3059, 3071, 3099-3100, 3122, 3126-3127, 3131.) Jose and Samuel Martinez were killed and Marvin was seriously injured. (8RT 2923; 9RT 3012-3016, 2023-3031, 3060-3062.) The same 12 gauge shotgun fired each of the shell casings recovered at the scene. (9RT 3157-3158, 3169.)

Phone records showed appellant’s phone was connected to the area of the murder before and after the shooting. (7RT 2263, 2266.) After the shooting, appellant called Arzate’s girlfriend, Cecilia Cruz, and asked her to pick them up from the area of the shooting because they “got into some shit.” (4RT 1340-1343; 5RT 1541, 1555-1556; 10RT 3349-3350, 3350, 3407, 3462, 3494; 11RT 3759, 3608.) She did not pick them up that night, but she spoke with Arzate the following day. (10RT 3372, 3467.) Arzate told Cruz that he and appellant had done the shooting and that appellant was so scared, he did not want to come out of his house. (10RT 3374-3375.)

ARGUMENT I

THE SUPREME COURT'S DECISIONS IN *MILLER* AND *MONTGOMERY* CREATE A STRONG PRESUMPTION AGAINST A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR JUVENILE OFFENDERS WHO COMMIT MURDER

A. The United States Supreme Court Has Repeatedly Recognized that Children/Juveniles are Constitutionally Different from Adults for Purposes of Sentencing and Has Created a Presumption Against Imposing Sentences of Life Without the Possibility of Parole for Juveniles

Beginning with *Roper v. Simmons*, the Supreme Court recognized, based on substantial empirical research, that children are fundamentally different and categorically less deserving of the harshest punishments. (*Roper v. Simmons* (2005) 543 U.S. 551, 578 [125 S.Ct. 1183, 161 L.Ed.2d 1](*Roper*).) The Court concluded that the treatment of juveniles in the criminal justice system should reflect that difference.

> As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed.

(*Id.* at pp. 569-570 [Internal quotations omitted.].) In light of their diminished culpability and greater prospect for reform retained by juveniles, the death penalty is cruel and unusual punishment for any juvenile offender in all cases. (*Id.* at pp. 569-570.) Five years later, the Court decided that LWOP sentences are cruel and unusual for juveniles and are, in all cases, disproportionate for non-homicide

offenses. (*Graham v. Florida* (2010) 560 U.S. 48, 82 [130 S.Ct. 2011, 176 L.Ed.2d 825] (*Graham*).)

Then, two years later, in *Miller*, the Court declared that a mandatory sentence of LWOP is cruel and unusual punishment for juveniles, even for homicide offenses, and made clear that sentences of life without the possibility for parole for juveniles will be "rare" and "uncommon," and preserved only for those who are "irreparably corrupt" and "permanently incorrigible." (*Miller, supra,* 132 S.Ct. at pp. 2464, 2469.) Last year, the Court clarified that under *Miller*, LWOP is excessive for all but the "rarest of children," those "whose crime reflects irreparable corruption," and rendered an LWOP sentence an unconstitutional penalty for the typical juvenile offender whose crimes reflect the "transient immaturity of youth." (*Montgomery, supra*, 136 S.Ct. at p. 734; See also, *Tatum v. Arizona* (2016) __ U.S. ___ [137 S.Ct. 11, 196 L.Ed.2d 284].)

As discussed in detail below, under *Miller* and *Montgomery* there is now a presumption against a sentence of life without the possibility of parole.

1. The Court In *Miller* Created a Presumption Against Life Without the Possibility of Parole

In *Miller*, the United States Supreme Court was faced with an Eighth Amendment challenge to the sentences of two 14-year-old defendants convicted of murder and sentenced to mandatory LWOP sentences. (*Miller, supra*, 132 S.Ct. at p. 2460.) The High Court recognized that children are different for the purposes of

the Eighth Amendment's proscription, that juveniles have "diminished culpability and greater prospects for reform" and thus, "are less deserving of the most severe punishments." (*Id.* at p. 2464, citing *Graham, supra*, 560 U.S. at p. 68.) Reiterating the findings in *Roper* and *Graham*, which are based on common sense, what "any parent knows," science, and social science, the High Court concluded that children's actions are less likely to be "evidence of irretrievable depravity" because children have a "lack of maturity," "an underdeveloped sense of responsibility," which leads to "recklessness, impulsivity, and heedless risk taking," are more vulnerable to "negative influences and outside pressures," have limited "control over their own environment," lack the "ability to extricate themselves from horrific, crime-producing setting," and do not have "well-formed character." (*Miller, supra*, at p. 2464.) These transient attributes of youth "both lessen a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" (*Id.* at p. 2465, citing *Graham, supra*, 560 U.S. at p. 68.)

The *Miller* Court concluded that these distinctive attributes of youth, acknowledged by *Roper* and *Graham*, diminish the penological justifications for the harshest sentences for juvenile officers, even for those who commit the most terrible crimes. Thus, the Court found that mandatory LWOP sentences for juveniles violate the Eighth Amendment because they prevent the sentencer from

taking into consideration an offender's age and "wealth of characteristics and circumstances attendant to it," and "foreswear altogether the rehabilitative ideal," which is "at odds with a child's capacity for change." (*Id.* at pp. 2465, 2466, 2468.) Thus, the *Miller* Court held that, before imposing an LWOP sentence on a juvenile offender, the sentencer must conduct individualized sentencing wherein the court considers the defendant's "chronological age and its hallmark features - among them immaturity impetuosity, and failure to appreciate risks and consequences," his family and home environment, the circumstances of the offense, including the extent of his participation and the impact of familial or peer pressure, his lack of sophistication with the criminal justice system, and his potential for rehabilitation. (*Miller, supra,* 132 S.Ct. at 2468.)

In refusing to consider the alternative argument that the Eighth Amendment requires a categorical bar on life without the possibility of parole, the Court declared that "given all we have said in *Roper*, *Graham*, and [*Miller*] 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*." (*Miller, supra,* 132 S.Ct. at 2469, emphasis added.) The Court explained, this "is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at an early age between "the juvenile offender whose crime reflects unfortunate, yet transient immaturity, and the rare juvenile

offender whose crime reflects irreparable corruption." (*Miller, supra,* 132 S.Ct. at 2469, citing *Roper, supra*, 543 U.S. at p. 573 ["It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate, yet, transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption . . . If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation- that a juvenile offender merits the death penalty."]; *Graham, supra*, 560 U.S. at p. 68 [because of a juvenile's salient characteristics, it is difficult for an expert psychologist to differentiate between the offender whose crime reflects transient immaturity and the "rare juvenile offender whose crime reflects irreparable corruption"; thus, "juvenile offenders cannot with reliability be classified among the worst offenders."].) The Court clarified, "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, supra*, 132 S.Ct. at p. 2469.)

Though *Miller* left open the possibility that discretionary juvenile LWOP sentences could still be imposed, *Miller* also, when read in combination with

Graham and *Roper*, created a presumption against sentences of life without the possibility of parole by condemning this sentence for juveniles except in the "uncommon" case and under the rarest circumstances where the court has considered how the differences in youth "*counsel against* irrevocably sentencing them to a lifetime in prison." (*Miller, supra*, 132 S.Ct. at p. 2469.)

Courts and legal scholars have recognized *Miller's* presumption against LWOP sentence for juveniles, even before the High Court's decision in *Montgomery*. For example, the Supreme Court in Connecticut in *State v. Riley* (Conn. 2015) 110 A.3d 1205, 1214, concluded *Miller's* warning that, once a sentencing court considers the mitigating factors of youth and its attendant circumstances, "appropriate occasions for sentencing juveniles to this harshest punishment will be uncommon," "suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances." (*Ibid*., citing, *Miller, supra*, 132 S.Ct. at p. 2469; See also, *Casiano v. Commissioner of Correction* (Conn. 2015) 115 A.3d 1031, 1042 [*Miller* set forth a presumption against LWOP for juveniles].) Similarly, the Supreme Court of South Dakota noted that while *Miller* did not "altogether prohibit life sentences without parole," its language stating that appropriate occasions for imposing such sentences would be "uncommon" indicates that the

High Court “thought such sentences would be the exception, not the rule.” (*State v. Springer* (N.D. 2014) 856 N.W.2d 460, 465, n. 5.) Likewise, the Pennsylvania Supreme Court, in recognizing that *Miller* did not entirely foreclose life without the possibility of parole sentences, noted that the High Court did state “that the occasion for such punishment would be “uncommon,” and, in any event must first ‘take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.’” (*Commonwealth v. Batts* (Penn. 2013) 66 A.3d 286, 291.)

The Massachusetts Supreme Court in *Diatchenko v. District Attorney for Suffolk* (Mass. 2013) 1 N.E.3d 270, 278, also recognized that *Miller* made clear that, given a juvenile’s “diminished culpability,” and their heightened capacity for change, “those occasions when juveniles will be sentenced to the ‘harshest penalty will be uncommon.’” (*Ibid.*, citing *Miller, supra*, 132 S.Ct. at p. 2469.) The Massachusetts Supreme Court went one step further and found that discretionary LWOP sentences were unconstitutional under its state constitution. The Court explained:

> Given current scientific research on adolescent brain development, and the myriad of significant ways that this development impacts a juvenile’s personality and behavior, a conclusive showing of traits such as an “irretrievably depraved character,” *Roper, supra*, 543 U.S. at 570, 125 S.Ct. 1183, *can never be made, with integrity* by the Commonwealth at an individualized sentencing hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender. See, *Miller*, 132 S.Ct. At 2464. Simply

> put, because the brain of the juvenile is not fully developed, either structurally or functionally, by the age of 18, *a judge cannot find with confidence* that a particular offender, at that point in time, is irretrievably depraved. See *Graham*, 560 U.S. at 68, 130 S.Ct. 2011. Therefore, it follows that the judge cannot ascertain with an reasonable degree of certainty, whether imposition of this most severe punishment is warranted.

(*Diatchenko v. District Attorney for Suffolk, supra,* 1 N.E.3d at pp. 283-284, emphasis added.)

In *State v. Seats* (Iowa 2015) 865 N.W.2d 545, the Iowa Supreme Court unequivocally recognized that the *Miller* majority created a presumption against LWOP sentences for juvenile offenders. It noted, "In not addressing the categorical challenge, the Court made it clear that the 'appropriate occasions for sentencing juveniles to the harshest possible penalty, [LWOP], will be uncommon.'" (*Id.* at p. 555.) The Iowa Supreme Court stated that the sentencing court "must start with the Supreme Court's pronouncement that sentencing a juvenile to life in prison without the possibility of parole should be rare and uncommon." (*Id.* at p. 555, citing *Miller, supra*, 132 S.Ct. at p. 2469.) "Thus, the presumption for any sentencing judge is that the judge should sentence juveniles to life in prison *with* the possibility of parole for murder unless the other [*Miller*] factors require a different sentence." (*State v. Seats, supra*, 865 N.W.2d at p. 555.) The Court further explained, "if the sentencing judge believes the information in the record rebuts the presumption to sentence a juvenile to life in prison with the

possibility of parole, and the case is the rare and uncommon case requiring the judge to sentence the juvenile to life in prison without the possibility of parole, the judge must make specific findings of fact discussing why the record rebuts the presumption." (*Id.* at p. 557; See also, *State v. Mantich* (Neb. 2014) 842 N.W.2d 716, 730 [Nebraska Supreme Court explained that *Miller* "sets forth the general rule that life imprisonment without parole should not be imposed upon a juvenile except in the rarest of cases where the juvenile cannot be distinguished from an adult based on diminished capacity or culpability."]; See also, *State v. Hart* (Mo. 2013) 404 S.W. 232, 241 ["a juvenile offender cannot be sentenced to life without parole for first degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances].)

There can be little doubt that the language in *Miller*, finding that sentences of life without the possibility of parole should be uncommon and only imposed on the rare juvenile offender, creates a presumption against such sentences. "Though *Miller* still permits life without parole for juvenile defendants convicted of homicide offenses, the Court said that this sentencing choice should be "uncommon." The distinctive features of youth should significantly influence sentencing, because only the "rare juvenile offender" should receive the harshest punishment available. This language effectively creates a presumption that

juvenile defendants should not receive life-without-parole sentences, and it is the state's burden to rebut presumption." (Drecom, Matthew, *Cruel and Unusual Parole* (2017) 95 Tex. L. Rev. 707, 720; See, Russell, Sarah, *Jury Sentencing and Juveniles Eighth Amendment Limits and Sixth Amendment Rights* (2015) 56 B.C. L. Rev. 553, 567-568 [the *Miller* Court set "a presumption that life-without-parole is not appropriate for a juvenile" when it stated such sentences should be "uncommon" because of the great difficulty recognized in *Roper* and *Graham* of distinguishing between a juvenile whose crime reflects transient immaturity and the rare juvenile whose crime reflects irreparable corruption]; see also, Scott, Grisso, Levick, and Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework* (2016) 88 Temp. L. Rev. 675, 689 [The *Miller* majority "goes beyond simply directing that mitigating evidence be considered. Two elements of the Court's analysis are key to implementing its direction to sentencing court - - its conclusion that the sentence of LWOP will be 'uncommon' because most juveniles, due to their developmental immaturity are less culpable than are adults, and its emphasis on the risk of an erroneous LWOP sentence. Together, these points effectively create a presumption of immaturity," which the state must overcome by "demonstrating that the convicted juvenile is one of the rare youths who deserves this sentence - - even for the grave offense of murder."].)

In sum, the language in *Miller* that juvenile LWOP should be "rare" and

"uncommon," which the Court based on commonsense and scientific evidence establishing that most juveniles are transiently immature and susceptible to change, and are not irreparably corrupt or permanently incorrigible, created a presumption against imposing the harshest sentence available to juvenile offenders. However, any doubt as to whether *Miller* created a presumption against LWOP for juveniles was resolved by the decision in *Montgomery*.

2. ***Montgomery*** **Reiterated** ***Miller's*** **Presumption Against Life Without the Possibility of Parole and Clarified that the Eighth Amendment Bans Sentences of Life Without the Possibility of Parole for All But the Rarest Offender Whose Offense Demonstrates Irreparable Corruption**

In *Montgomery, supra*, the United States Supreme Court expanded its holding in *Miller* and concluded that its decision in *Miller* created a new substantive rule of constitutional law and thus, applies retroactively to final convictions in state courts under the principles of *Teague v. Lane* (1989) 489 U.S. 288 [109 S.Ct. 1060, 103 L.Ed.2d 334]. (*Montgomery, supra*, 136 S.Ct. 732.) In reaching this decision, the High Court explained that *Miller* started with the principle from *Roper* and *Graham* "that children are constitutionally different from adults for purposes of sentencing," that these differences "result from children's diminished culpability and greater prospects for reform," and thus, mandatory LWOP sentences are unconstitutional. (*Id.* at p. 733-734.) The *Montgomery* Court further elucidated that *Miller* requires that, before a sentencer imposes LWOP on a

juvenile, it must consider "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," and "made clear" that appropriate occasions for imposing LWOP will be "uncommon." (*Id.* at pp. 733-734, citing *Miller, supra*, 132 S.Ct. at p. 2469.)

The Court in *Montgomery* then provided guidance about the scope of the constitutional rule it created in *Miller*. The Court explained:

> *Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." [*Miller*, 132 S.Ct. at 2465].) Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "'unfortunate yet transient immaturity.'" *Id.*, at 132 S.Ct. 2455, 2469 (quoting *Roper*, 543 U.S., at 573). Because *Miller* determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" 132 S.Ct. 2455, 2469, 183 L. Ed.2d 407, 424 (quoting *Roper, supra*, at 573), it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status" – that is, juvenile offenders whose crimes reflect the transient immaturity of youth. [citation] As a result, *Miller* announced a substantive rule of constitutional law. Like other substantive rules, *Miller* is retroactive because it "'necessarily carr[ies] a significant risk that a defendant'" – here, the vast majority of juvenile offenders – "'faces a punishment that the law cannot impose upon him.'" [citation].

(*Montgomery, supra*, 193 L.Ed.2d at 614.)

Then, in rejecting the state of Louisiana's claim that *Miller* created only a procedural rule because the *Miller* Court specifically stated that its decision "does not categorically bar a penalty for a class of offenders" and only mandates a

"sentencer follow a certain process," the *Montgomery* Court explained:

> *Miller*, it is true, did not bar a punishment for all juvenile offenders, as the Court did in *Roper* or *Graham*. *Miller* did bar life without parole, however, for all but the **rarest** of juvenile offenders, those **whose crimes reflect permanent incorrigibility**. For that reason, *Miller* is no less substantive than are *Roper* and *Graham*. Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the **rare** juvenile offender who can receive that same sentence. The only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other hand, is that *Miller* **drew the line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption**.

(*Id.* at p. 734, emphasis added.)

Thus, *Montgomery* "emphasizes that an LWOP sentence is permitted only in 'exceptional circumstances,' for the 'rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible'; for those "rarest of juvenile offenders . . . whose crimes reflect permanent incorrigibility'; for 'those rare children whose crimes reflect irreparable corruption' - and not, it is repeated twice, for the 'vast majority of juvenile offenders.'" (*Veal v. State* (Ga. 2016) 784 S.E.2d 403, 412.) Because "*Miller* and *Montgomery* repeatedly emphasize that a life-without-parole sentence is the rare exception to the rule that is founded in the proportionality provisions of Eighth Amendment," "any sentencing proceeding of a juvenile must start with the presumption that the sentence should provide for some form of parole eligibility" and the denial of parole eligibility can be justified, "only if," the prosecution proves that the juvenile "fits the unusual category of

someone of 'permanent incorrigibility" or 'irretrievable depravity.'" (Antokwiak, Bruce, *Don't Rush to Judgment* (2016) 38-Dec. Pa. Law 33, 37-38; see also, Grisso and Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on Miller v. Alabama* (2016), Psychology, Public Policy and Law, Vol. 22, No. 3, 235, 237 [a sentencing hearing must start with the presumption that the defendant has rehabilitative potential, as well as, the expectation that exceptions to this rehabilitative presumption will be exceptionally rare]; *State v. Sweet* (Iowa 2016) 879 N.W.2d 811, 834-835 [before concluding that the Iowa state constitution prohibits LWOP sentences for juveniles, the Iowa Supreme Court noted, "In light of *Miller*, as elaborated by *Montgomery*, the United States Constitution allows life without the possibility of parole for juveniles, if at all, only in the "rarest of cases" even for the "heinous crimes committed by juvenile offenders."].)

"So strong was the implied rarity of juveniles eligible for LWOP that Justice Scalia, in his dissent, concluded that 'this whole exercise, this whole distortion of *Miller* . . . [is] just a devious way of eliminating life without parole for juvenile offenders.'" (Grisso and Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on Miller v. Alabama* (2016), Psychology, Public Policy and Law, Vol. 22, No. 3, 235, 236, citing *Montgomery, supra*, 136 S.Ct. at p. 774, Scalia dissent.) The majority in *Montgomery*, "used the words

"rare" or "rarest" six times in describing when a life-without-parole sentence would be appropriate after *Miller*." (*People v. Hyatt* (Mich. 2016) ___ N.W.2d ___ [316 Mich.App. 368, at p. *20].) Thus, the sentencer "must begin with the understanding that in all but the rarest of circumstances, a life-without-parole sentence will be disproportionate for the juvenile offender at issue. . . . a sentencing court must operate under the understanding that life without parole is, more often than not, not just inappropriate, but a violation of the juvenile's constitutional rights." (*Ibid.*)

The Court in *Montgomery* made clear that there is a strong presumption against LWOP sentences for juvenile offenders. Only the "rarest offenders" whose crimes reflect irreparable corruption or permanent incorrigibility may face LWOP. Therefore, the sentencer must start with the presumption that the defendant is the typical juvenile whose crime reflects transient immaturity, and thus, that an LWOP sentence is prohibited under the Eighth Amendment. As detailed below, this presumption must be overcome by the prosecution by proof, beyond a reasonable doubt, that the defendant is one of the rarest juveniles who is irreparably corrupt or permanently incorrigible.

B. Because *Montgomery* and *Miller* Create a Presumption Against LWOP for Juveniles, the Prosecution Bears the Burden of Rebutting the Presumption By Proving Beyond a Reasonable Doubt that the Juvenile is Irreparably Corrupt or Permanently Incorrigible Such that Rehabilitation is Not Possible in his Lifetime.

As discussed above, *Montgomery* and *Miller* create a presumption against

LWOP for juvenile offenders and establish that the presumed sentence for a juvenile offender who commits murder includes parole eligibility. To overcome the presumptive sentence, and impose an aggravated term of life without the possibility of parole, the sentencer must make a finding that the defendant is the "rarest" of juveniles who is "irreparably corrupt" or "permanently incorrigible." (*Montgomery, supra*, 136 S.Ct. At p. 734.) Absent such a finding, an LWOP sentence violates the Eighth Amendment. (*Ibid.*) Because the presumptive sentence includes parole eligibility, facts which overcome the presumption and subject the juvenile to an enhanced LWOP term, the harshest sentence available to children, must be proven beyond a reasonable doubt. Without this high burden, it cannot be assured that *only* the *rarest* juveniles whose crimes reflect *irreparable corruption* or *permanent incorrigibility* will suffer the most severe punishment available to juvenile offenders, one that is akin to the death penalty for adults.

1. The Difficulty in Accurately Distinguishing Between Those Juveniles Who Are Transiently Immature And Those Who Are Irreparably Corrupt or Permanently Incorrigible Requires the Highest Burden of Proof

In holding that *Miller* created a new rule of substantive constitutional law and thus, that it applies retroactively, the High Court noted that "*Miller's* conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution." (*Montgomery, supra*, 136 S.Ct. at p. 736.) "Life

without parole "forswears altogether the rehabilitative ideal" (*Graham, supra*, 130 S.Ct. at p. 2030). It reflects "an irrevocable judgment about [an offender's] value and place in society," at odds with a child's capacity for change. (*Ibid.*)" (*Miller, supra*, 132 S.Ct. at p. 2465.) As the court in *Graham* concluded, "[I]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile whose crime reflects permanent incorrigibility." (*Graham, supra*, 560 U.S. at p. 68.) This conclusion was buttressed by the *amicus* brief filed in *Miller* by the American Psychological Association (APA), who bluntly stated that "[t]he positive predictive power of juvenile psychotherapy assessments . . . remains poor." (*State v. Sweet, supra*, 879 N.W.2d at p. 829, citing APA amicus brief in *Miller*, 2012 WL 174239, *21-22.) "According to the APA, 'those who have dedicated their careers to identifying risk factors associated with persistent criminality,' acknowledge the 'very imperfect predictions of which offense trajectory individuals will follow over time' and warn against the 'danger that policy makers will start to use less than good predictions as a rationale for harsh punishments and severe legal sanctions.'" (*Ibid.*)

Given the recognized difficulties in predicting a juvenile's rehabilitative capacity and distinguishing between transient immaturity and irreparable corruption, a sentencer is placed in the impossible position of making such a

determination, "at a time when even trained professionals with years of clinical experience would not attempt to make such a determination." (*State v. Sweet, supra*, 879 N.W.2d at p. 836.) Thus, if this State is going to force the sentencer to make such a judgment on a juvenile's capacity to change at the time of sentencing, and the sentencer is going to impose a term that is the equivalent of death in prison, the Eighth Amendment requires that the State make sure such juvenile is truly the exceptionally rare child who is permanently incorrigible or irreparably corrupt such that he is "beyond redemption." (*Adams v. Alabama* (2016) ___ U.S. ___ [136 S.Ct. 1796, 195 L.Ed.2d 251], Sotomayor, J., and Ginsburg, J., concurring.) The only way to faithfully ensure compliance with the dictates of *Miller*, *Montgomery* and the Eighth Amendment and not only answer the question *Miller* posed, "but to answer correctly" whether the "juvenile's crime reflects transient immaturity or irreparable corruption" (*Id.* at p. 1800) is to hold the prosecution to the highest burden of proof available in our jurisprudence- proof beyond a reasonable doubt.

2. Because the Presumption Against Unconstitutional Sentences Is Akin to the Presumption of Innocence, the Beyond a Reasonable Doubt Standard Should Apply

This high standard of proof will ensure against unconstitutional sentences by giving substance to the presumption against LWOP sentences. In explaining why it applied the beyond a reasonable doubt standard to overcome the

presumption of innocence, the Supreme Court stated, "A high standard of proof is necessary, we said, to ensure against unjust convictions by giving substance to the presumption of innocence." (*Lego v. Twomey* (1972) 404 U.S. 477, 487 [92 S.Ct. 619, 30 L.Ed.2d 618], citing, *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) The constitutionalization of this standard represents an effort to give "concrete substance to the presumption of innocence." (*Id.* at p. 363.) This is because, as Sir William Blackstone eloquently put it, "it is better that ten guilty persons escape than that one innocent suffer." (4 William Blackstone Commentaries 352 (1769).) "The interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." (*Addington v. Texas* (1979) 441 U.S. 418 423 [99 S.Ct. 1804, 60 L.Ed.2d 323].)

The same is true of the presumption against sentences of life without the possibility of parole for juvenile offenders. *Miller* and *Montgomery* explained that the Eighth Amendment only permits LWOP sentences for the "rarest" juveniles who are irreparably corrupt, permanently incorrigible and beyond redemption. The vast majority of juveniles will not be subject to this penalty because, as *Graham* explained, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity,

and the rare juvenile offender whose crime reflects irreparable corruption." (*Graham, supra*, 560 U.S. at p. 68.) To give substance to the presumption against LWOP sentencing created by the Supreme Court in its interpretation of the Eighth Amendment, and ensure that faithful compliance with it, nothing short of proof beyond a reasonable doubt will suffice.

3. Because the Presumption Establishes a Maximum Sentence of Life With Parole Eligibility and Additional Fact-Finding is Required to Raise the Ceiling, Those Facts Must be Proven Beyond a Reasonable Doubt

Moreover, following *Miller* and *Montgomery*, a sentence of LWOP is not automatically authorized based solely on the jury's true finding on a special circumstance allegation, and is, in fact, presumed invalid, unless and until the sentencer considers additional facts and finds that the juvenile is irreparably corrupt and incapable of rehabilitation. This additional factual finding raises the ceiling of permissible punishment, and thus, must be proven beyond a reasonable doubt[4].

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In the Court of Appeal and in his Petition for Review, appellant argued that the Sixth Amendment requires a jury trial to determine whether appellant was one of the rare offenders whose crimes reflects irreparable corruption or permanent incorrigibility because, without this additional finding the maximum sentence that could be imposed by statute was 25 years to life. This Court denied review on this issue. However, if this Court agrees that there is a presumption against LWOP sentences for juveniles, then the verdict alone only allows for a sentence of 25 years to life. Thus, the next logical question is the prosecution's burden in overcoming the presumption to justify elevating the sentence to the rare LWOP term. The Sixth Amendment cases support appellant's contention that the burden

"The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt." (*Hurst v. Florida* (2016) ___ U.S. ___ [136 S.Ct. 616, 193 L.Ed.2d 504], citing, *Alleyne v. United States* (2013) 570 U.S. __, [133 S.Ct. 2151, 2156, 186 L.Ed.2d 314]; See also, *Sullivan v. Lousiana* (1993) 508 U.S. 275, 278 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368] ["The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."].) In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435], the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. In the years since *Apprendi*, the Supreme Court has applied its rule to instances involving plea bargains (*Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]), sentencing guidelines (*United States v. Booker* (2005) 543 U.S. 220, [125 S.Ct. 738, 160 L.Ed.2d 621]), criminal fines

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on the prosecution is to prove, beyond a reasonable doubt, that appellant is permanently incorrigible or irreparably corrupt, regardless of who this Court determines is the finder of fact, i.e, the jury or a court.

(*Southern Union Co. v. United States* (2012) 567 U.S. ___ [132 S.Ct. 2344, 183 L.Ed.2d 318]), mandatory minimums (*Alleyne v. United States, supra*, 133 S.Ct. at p. 2166), this State's former determinate sentencing scheme (*Cunningham v. California* (2007) 549 U.S. 270, 275 [127 S.Ct. 856, 166 L.Ed.2d 856]) and, capital punishment (*Ring v. Arizona* (2002) 536 U.S. 584, 608-609 [122 S.Ct. 2428, 153 L.Ed. 556].)

More recently, in *Hurst v. Florida, supra,* 136 S.Ct. 616, the High Court addressed the required role of the jury in making sentencing decisions in capital cases. Under the Florida statute, the maximum sentence a capital felon could receive on the basis of conviction alone was life imprisonment. (*Id.* at 136 S.Ct. at p. 620.) In order to impose the death penalty, the statute prescribed a "hybrid" procedure whereby the jury rendered an advisory verdict, but the judge made the ultimate sentencing determinations. The statute provided, "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." (*Ibid*., citing Fla. Stat. § 921.141 (3).) The Supreme Court concluded that because the maximum punishment Hurst could have received without any judge-made findings was life in prison without parole, and a judge imposed the increased punishment based on her own factfinding, the sentence violated the Sixth Amendment. (*Id.* at 621-622, citing *Ring v. Arizona, supra*, 536 U.S. 584,

604.)

Similarly, after *Miller* and *Montgomery*, the maximum punishment a defendant can receive in California for first degree murder with a special circumstance finding based solely on the jury's verdict is 25 years to life. This is so because under *Montgomery* and *Miller*, the Eighth Amendment prohibits sentences of LWOP for the vast majority of juvenile offenders and, as discussed above, sets the presumptive sentence at life with parole eligibility, regardless of the heinous nature of the offense. A sentence of LWOP can only pass constitutional muster where the sentencer makes the additional finding that the defendant is one of the rarest juveniles who is irreparably corrupt or permanently incorrigible. In other words, the Eighth Amendment requires this additional factual, which is not encompassed in the jury's true finding on the special circumstance allegation, before a sentence of LWOP can be imposed. Absent this factual finding, the maximum sentence that may be imposed based on the jury's verdict, is 25 years to life.

The *Alleyne* Court explained, that the "touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." (*Alleyne v. United States, supra*, 133 S.Ct. at p. 2158.) "[A] fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above

what is legally prescribed." (*Ibid*.) The Court concluded, "it is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment," and thus, trigger rights to a finding beyond a reasonable doubt by a jury. (*Id.* at p. 2161.)

Thus, under *Alleyne*, *Apprendi* and its progeny, any fact/element/ingredient which increases the punishment a defendant may receive, beyond the sentence established by a determination of guilt, must be proven beyond a reasonable doubt. (*Apprendi v. New Jersey, supra*, 530 U.S. at pp. 470-471.) The "statutory maximum, is not the maximum sentence a judge may impose after finding additional facts, but the maximum, he may impose without any additional findings." (*Blakely v. Washington, supra*, 542 U.S. at p. 303.) After *Montgomery* and *Miller*, a finding of guilt of first degree murder and a true finding on the special circumstance only allows for a sentence of 25 years to life. To impose an elevated term of life without the possibility of parole, additional, specific findings of permanent incorrigibility and/or irreparable corruption, are required by the sentencer. Thus, under the Fifth and Sixth Amendments, the prosecution must prove, beyond a reasonable doubt, the facts supporting the ultimate determination that the defendant is one of the rarest juvenile offenders who is irreparably corrupt or permanently incorrigible.[5] (See, Russell and Denholtz, *Procedures for*

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[5] Appellant recognizes that the First Appellate District, Division Five in *People v.*

Proportionate Sentences: The Next Wave of Eighth Amendment Non-Capital Litigation (2016) 48 Conn. L. Rev. 1121, 1156 ["*Miller* and *Montgomery* set an Eighth Amendment ceiling on the punishment that may be imposes in the "vast majority" of juvenile cases" and the "enhanced sentence" is permissible only if "certain facts are established," those facts must be found beyond a reasonable doubt."]; Antokwiak, Bruce, *Don't Rush to Judgment, supra,* 38-Dec. Pa. Law 33, 37-38 ["*Alleyne* arguably requires that to elevate a sentence from a lesser mandatory minimum to life without parole, the burden must be on the [state] to prove a justifying element beyond a reasonable doubt."].)

"Although an Eighth Amendment punishment ceiling is set by the Constitution rather than by a legislature or sentencing commission, it nonetheless defines the sentencing range to which a defendant may be exposed," and thus, the facts necessary to raise the ceiling would need to be found beyond a reasonable doubt. (Russell and Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Non-Capital Litigation*, *supra*, at p. 1156; Russell, Sarah, *Jury Sentencing and Juveniles Eighth Amendment Limits and Sixth Amendment Rights* (2015) 56 B.C. L. Rev. 553, 558-559 ["[W]ith the Eighth

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Blackwell (2016) 3 Cal.App.5th 166 and the Michigan Court of Appeal *People v. Hyatt, supra,*__ N.W.2d __ [316 Mich.App. 368] disagreed. However, both are distinguishable because neither court addressed nor was asked to address whether *Miller* and *Montgomery* created a presumption against LWOP. If there is a presumption, as appellant argues, both *Blackwell* and *Hyatt* are wrong.

Amendment jurisprudence creating a ceiling on punishment, the facts necessary to raise the ceiling would need to be found by the sentencer beyond a reasonable doubt" and the ceiling for juveniles under *Miller* is life with parole].) It makes no difference whether a statute or the Constitution, as interpreted by the United States Supreme Court, requires that such a fact be found because the result is the same for the defendant, namely, he or she faces a significantly more severe sentence based on the factual finding. (*Id.* at p. 578.) Thus, under *Apprendi* and its progeny, categorical Eighth Amendment limits trigger Fifth, Sixth and Fourteenth Amendment rights. (*Ibid.*) Because *Miller* and *Montgomery* combine to create a categorical ban against LWOP sentences for the vast majority of juvenile offenders whose crimes reflect transient immaturity, and create a strong presumption against such sentences, imposition of the most severe sentence available to juveniles requires additional factual findings not inherent in the verdict. Thus, these facts must be proven beyond a reasonable doubt to the sentencer, regardless of whether the sentencer is a court or a jury.

Notably, in *State v. Hart, supra*, 404 S.W.3d 232, 241, the Missouri Supreme Court reached this same conclusion, even before *Montgomery* expanded and clarified *Miller*. In addressing the burden of proof required at a resentencing hearing under *Miller*, the Court found that on remand to consider the sentence in light of *Miller*, the sentencer cannot impose life without parole for first-degree

murder "unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under the circumstances." (*Id.* at p. 241, citing *Cunningham v. California, supra,* 549 U.S. 270, 290.)

Because *Miller* and *Montgomery* create a presumption against sentences of LWOP and set the ceiling absent additional factual findings at a term that includes parole eligibility, in our State 25 years to life, the prosecution must bear the burden of proving the facts necessary to overcome the presumption beyond a reasonable doubt. Any other standard would be insufficient to protect against unconstitutional sentences for juvenile offenders and would violate the Fifth, Sixth and Fourteenth Amendments.

C. Since the Trial Court Did Not Recognize the Presumption Against LWOP Created by *Miller* and *Montgomery* or Hold the Prosecution to Its Burden, It Erred and Reversal of Appellant's Sentence is Required

At appellant's sentencing hearing, the court recognized that under *Miller*, it had to consider the "defendant's attribute[s] with respect to maturity, immaturity, capacity for change and what has also been alluded to as the distinct attributes of youth." (16RT 6615.) The sentencing court, however, expressly rejected defense counsel's claim that under *Miller* "it is presumptive. . . that a defendant who is the same age as my client has a mental capacity to judge and analyze a situation that is not fully formed," "that a juvenile's executive functions are presumed not to be that of an adult," that the "overriding issue" is whether "there is an ability for this

defendant to rehabilitate himself," and thus, that counsel need not put a "psychiatrist on to testify that my client's executive functions are not fully formed." (16RT 6617.)

The court stated it had listened to the arguments in *Miller*, listened to the bench discussion, read the opinion, and, based on that, "there is a slight disagreement" between what counsel argues and what the "court believes it has read and heard." (16RT 6618.) The court then interrupted the testimony of Daniel Vasquez as he testified about the rehabilitative programs available to individuals who receive sentences of life, as opposed to LWOP, and the parole process, which requires a finding of whether the defendant poses a threat to public safety. (16RT 6622.) The court explained that what it needs is "information on why this gentleman believes that your client . . . poses a threat in the future or would not pose a threat and so on." (16RT 6622.) When defense counsel attempted to ask Vasquez about the Long-Term Offender Pilot Program and the work it does with offenders serving 25 years to life, the court sustained the prosecution's relevance objection. (16RT 6626.)

Counsel asked no further questions of Vasquez and presented no further *Miller* evidence[6], instead arguing that appellant had been in custody for three years

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Defense counsel presented no evidence from family members, family friends, teachers or mentors about appellant's life, trauma he may have suffered, difficulties he may have endured or about positive attributes he may have had. He

and was in the general population, appellant did not engage in gang activity in the county jail, there was evidence appellant had been drinking on the night of the offense, and appellant was not the direct perpetrator. (16RT 6627-6628.) The prosecutor responded that the defense presented nothing related to the *Miller* factors, that the record shows appellant was not immature because he knew what he was involving himself in, knew how to deal with police during his interrogation, chose to engage in gang activity, and knowingly participated in a callous, unexplainable homicide. (16RT 6631-6632.)

The court concluded that appellant presented no evidence relevant to the *Miller* factors, namely that he has the capacity for change, that he suffered from psychological trauma, insufficient adult supervision or significant stress, or that he suffers from cognitive limitations due to metal illness, developmental disabilities or other issues that led to the commitment offense. (16RT 6333.) The court then considered the aggravating factors related to the crime as set forth in Rule 4.421, subdivision (a) of the California Rules of Court and concluded that consecutive LWOP terms were not disproportionate under the Eighth Amendment. (16RT 6334, 6636.)

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failed to present any information about how appellant grew up, how he came to associate with the gang and ultimately came to participate in the crime. Appellant was not evaluated by a psychiatrist or psychologist, and no school records, psychiatric records, social services records or other material relevant to his social history were presented.

As the foregoing demonstrates, the trial court here did not apply the presumption against life without parole. The court did not start with the presumption that appellant was in the class of the vast majority of juvenile defendants whose crimes reflect transient immaturity and thus, that 25 years to life was the only constitutionally authorized sentence. Rather, the court specifically rejected defense counsel's claim that appellant is presumed immature and is, therefore, presumed to be in the class of defendants for whom LWOP is prohibited by the constitution. (16RT 6617-6618.) Moreover, because the court did not recognize the presumption against LWOP sentences, it did not require the prosecution to overcome the presumption.

The Court of Appeal, like the sentencing court, found that *Miller* "did not create a presumption against life without parole sentences," but rather, "mandates only that a sentencer follow a certain process - considering an offender's youth and attendant circumstances - before imposing a particular penalty." (Opinion, pp. 39-40.) As set forth above, this conclusion is wrong. As the *Montgomery* decision makes clear, *Miller* created a new rule of substantive constitutional law, banned LWOP sentences for the vast majority of juvenile offenders whose crimes reflect transient immaturity, and created a strong presumption against LWOP sentences for juveniles, permitting such sentences only for the *rarest* of juveniles whose crimes reflect *irreparable corruption or permanent incorrigibility*.

Because the court failed to apply the presumption set forth in *Miller* and restated and expanded in *Montgomery*, appellant's consecutive sentences of life without the possibility of parole violate the Eighth Amendment as interpreted by *Miller* and *Montgomery*. Reversal of his sentence is required.

ARGUMENT II

BECAUSE *MONTGOMERY* AND *MILLER* MAKE CLEAR THAT THE EIGHTH AMENDMENT PERMITS A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR ONLY THOSE RAREST JUVENILE OFFENDERS WHOSE CRIMES REFLECT IRREPARABLE CORRUPTION OR PERMANENT INCORRIGIBILITY, THE TRIAL COURT MUST MAKE SUCH A FINDING BEFORE IT CAN IMPOSE SUCH A SENTENCE

A. The Trial Court Must Make a Finding Based on Substantial Evidence that a Defendant is Permanently Incorrigible and Irreparably Corrupt Before Imposing an Sentence of LWOP

While the High Court in *Montgomery* found that the *Miller* rule created a new rule of substantive constitutional law, it also recognized a procedural component to the rule. The *Montgomery* court explained that "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics" in order "to separate those juveniles who may be sentenced to life without parole from those who may not." (*Montgomery, supra*, 136 S.Ct. at p. 734-735.) The Court added that, while states are afforded latitude in developing procedures for complying with *Miller's* constitutional mandate, states are not "free to sentence a child whose crime reflects transient maturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." (*Id.* at p. 735.) Thus, the ultimate question the trial court must expressly answer is whether the defendant is one of the "vast majority" of juvenile offenders whose crime reflects transient immaturity or whether he is one

of the “rarest” offenders whose crime reflects irreparable corruption or permanent incorrigibility. This is true because, “[e]ven if a court considers a child’s age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.” (*Montgomery, supra*, 136 S.Ct. at p. 734.)

The United States Supreme Court made this required finding clear in its decisions granting certiorari and remanding cases for reconsideration in light of *Montgomery*. (*Tatum v. Arizona, supra,* 137 S.Ct. 11, 12, Sotomayor, J., concurring; *Adams v. Alabama, supra,*136 S.Ct. 1796, Sotomayor, J., and Ginsberg, J., concurring.) Justice Sotomayor, concurring in the decision to grant certiorari and remand the matter in *Tatum*, stated “the question *Miller* and *Montgomery* require a sentencer to ask” is “whether the petitioner was among the ‘very rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.’” (*Tatum v. Arizona, supra*, 137 S.Ct. at p. 12.) Similarly, in *Adams*, Justices Sotomayor and Ginsberg, concurring in the decision to grant, vacate and remand for reconsideration in light of *Montgomery*, noted that “there is no indication that, when the factfinders in these cases considered petitioners’ youth, they even asked the question *Miller* required them not only to answer, but to answer correctly: whether petitioners’ crimes reflected ‘transient immaturity’ or ‘irreparable corruption.’” (*Adams v. Alabama, supra*, 136 S.Ct. at p. 1800; See

also, *Veal v. State, supra*, 784 S.E.2d at p. 703 [the sentencer must make a "distinct determination," "on the record, that the defendant is irreparably corrupt or permanently incorrigible to put him in the narrow class of offenders for whom an LWOP sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined by *Montgomery*."]; *Jackson v. State* (Minn. 2016) 883 N.W.2d 272, 279 [Court must consider whether defendant is one of the "vast majority of juvenile offenders whose crimes reflect "transient immaturity," or is one of the "rare" juveniles whose crimes reflect "irreparable corruption" or "permanent incorrigibility."].)

The Supreme Court has made clear that a sentencer cannot simply consider youth and its attendant circumstances in deciding whether to impose an LWOP sentence. Rather, the sentencer must explicitly answer, and answer correctly, the ultimate question of whether the defendant is one of the rare juveniles who is permanently incorrigible because he is irreparably corrupt as opposed to the one of the vast majority of juvenile offenders whose crime reflects transient immaturity. Absent this explicit finding, a juvenile LWOP sentence violates the Eighth Amendment. (See, Russell and Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Non-Capital Litigation, supra,* at p. 1130 [*"Miller* and *Montgomery* place a ceiling on punishment for the vast majority of juveniles. Absent a properly informed finding that a child is "the rare

juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible," life without parole cannot be imposed."]; Berman, Douglas, *Montgomery's Messy Trifecta* (2016) 73 Nat'l Law. Guild Rev., 103, 105 ["it would now seem the Eighth Amendment does in fact make a particular substantive factor essential before any juvenile offender can ever be sentenced to life without parole - - namely, there must be a substantive finding that [the] *juvenile's murder did not reflect transient immaturity*."].)

Notably, this Court in *People v. Gutierrez* (2014) 58 Cal.4th 1354, in finding that Penal Code section 190.5, subdivision (b) confers discretion on the sentencing court to impose either 25 years to life or LWOP, and thus, does not violate *Miller*, recognized that the question in evaluating the *Mille*r factors is whether the defendant can be deemed "at the time of sentencing to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter society notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults." (*Id.* at 1391.) While some courts, like the Court in *People v. Chavez* (2014) 228 Cal.App.4th 18, 33, have recognized that the ultimate question to be answered is whether the crime reflected transient immaturity or irreparable corruption, numerous other courts, including the lower courts in this case, have ignored the language in *Gutierrez* and have failed to address the ultimate question to be answered by *Miller* and now, *Montgomery*.

(See, *People v. Padilla* (2016) 4 Cal.App.5th 656, 673-674, rev. granted, Case No. S239454 [trial court "neither stated that appellant was irreparably corrupt nor made a determination of permanent incorrigibility"]; *People v. Palafox* (2014) 231 Cal.App.4th 68, 73 [holding that *Miller* and *Gutierrez* "mandate only that a sentencer follow a certain process - considering an offender's youth and attendant characteristics- before imposing a particular penalty," and do not provide a directive as to "how to assess the *Miller* factors."].)

As discussed below, the sentencer in appellant's case did not consider or answer this ultimate question before imposing two consecutive LWOP sentences. The Court of Appeal followed the decision in *Palafox*, and concluded that a finding appellant was irreparably corrupt or permanently incorrigible was not required under *Miller*. This was error and requires the reversal of appellant's sentence.

B. Because an LWOP Sentence Violates the Eighth Amendment for All But the Rarest of Juvenile Offenders Who Are Irreparably Corrupt, the Trial Court's Finding of Irreparable Corruption Involves the Application of Federal Constitution Law Which Requires *De Novo* Review on Appeal

As discussed in detail above, *Miller* created a substantive rule that LWOP terms are unconstitutional "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." (*Montgomery, supra,* 136 S. Ct. at 734.) Sentencing courts must, therefore, utilize "the process that *Miller* set forth to

determine whether a particular defendant falls into this *almost-all* juvenile murder category for LWOP sentences are banned." (*Veal v. State, supra*, 784 S.E.2d at p. 411.) Because "permanent incorrigibility" is a determination of substantive constitutional law, the decision to sentence juvenile offenders to die in prison must not only be reasonable, it must be correct. (*Adams v. Alabama, supra*, 136 S.Ct. at p. 1800, Sotomayor, J., and Ginsberg, J., concurring.) As the Georgia Supreme Court noted, "a sentence imposed in violation of the *substantive* rule - that is, an LWOP sentence imposed on a juvenile who is not properly determined to be in the very small class of juveniles for whom such a sentence may be deemed constitutionally proportionate - 'is not just erroneous but contrary to law, and as a result void.'" (*Veal v. State, supra,* 784 S.E.2d at p. 701.) For these reasons, the abuse of discretion standard is insufficient to ensure that a sentencing court complies with *Miller*, *Montgomery* and the Eighth Amendment, and that the court does so correctly to ensure that only the "rarest" juveniles who are irreparably corrupt or permanently incorrigible are sentenced to LWOP terms, and that no juvenile whose crimes reflect transient immaturity is given a sentence prohibited by the constitution.

Moreover, an abuse of discretion standard would permit varied results that are "inconsistent with the idea of a unitary system of law." (*Ornelas v. United States* (1996) 517 U.S. 690, 697 [116 S.Ct. 1657, 134 L.Ed.2d 911].) Particularly

in areas of constitutional law - like this - where the law awaits further development after *Miller* and *Montgomery*, "'[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 and general standards like "irreparable corruption" and "permanent incorrigibility," resulting in disparate results in similar cases and sentences which violate the Eighth Amendment. (*Id.* at pp. 900-901.) Currently, there is no clear definition of which defendants belong in the class of the "rarest of juvenile offenders," or which defendants' crimes reflect transient immaturity versus irreparable corruption or permanent incorrigibility, and this determination should not be left to the broad discretion of a single judge to essentially predict the future. A defendant's Eighth Amendment right against excessive punishment cannot turn on "whether different trial judges draw general conclusions that the facts are sufficient or insufficient" for a juvenile to be deemed one of the "rarest" offenders who is irreparably corrupt or permanently incorrigible. (*Ornelas v. United States, supra*, 517 U.S. at p. 171.

Additionally, questions of law are reviewed *de novo*. (See, e.g., *People v. Cromer* (2001) 24 Cal.4th 889, 893-894; *People v. Butler* (2003) 31 Cal.4th 1119, 1127.) Moreover, mixed questions of law and fact, where the facts are undisputed

and the law is clear -- in other words, "whether the rule of law as applied to the established facts is or is not violated" -- are also decided *de novo*. (*Id.* at p. 894.) In California, the question of whether a punishment is cruel or unusual in violation of the California Constitution under the legal principles set forth in *Lynch* [*In re Lynch* (1972) 8 Cal.3d 410, 414] and *Dillon* [*People v. Dillon* (1983) 34 Cal.3d 441, 478], "presents a question of law subject to independent review; it is 'not a discretionary decision to which the appellate court must defer.' [Citation.]" (*People v. Garcia* (2017) 7 Cal.App.5th 941, 951; *People v. Martinez* (1999) 76 Cal.App.4th 489, 496.) The same standard should be applied when evaluating a defendant's claim that his LWOP sentence violates the substantive constitutional rule interpreting the Eighth Amendment set forth by the Supreme Court in *Miller* and *Montgomery*. The question of whether the defendant is one of the rarest of juveniles who is irreparably corrupt or permanently incorrigible and thus, one of the exceptional individuals for whom a ban against LWOP is not imposed, involves an important question of federal constitutional law.

Although sentencing decisions do involve factual findings, that does not render abuse of discretion review of the constitutionality of the sentence acceptable. First, both the United States Supreme Court and this Court have applied *de novo* review to mixed questions of law and fact that implicate a criminal defendant's constitutional rights. (See e.g., *Lilly v. Virginia* (1999) 527 U.S. 116,

136-37 [119 S.Ct. 1887, 144 L.Ed.2d 117] (plurality opinion) [holding that the standard of review for admission of hearsay statements is *de novo* under the Sixth Amendment's Confrontation Clause]; *United States v. Bajakajian* (1998) 524 U.S. 321, 337 n.10 [118 S.Ct. 2028, 141 L.Ed.2d 314][stating that *de novo* review is appropriate when applying the standard of excessiveness in a case alleging a violation of the Eighth Amendment's Excessive Fines Clause]; *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 433-436 [121 S.Ct. 1678, 149 L.Ed.2d 674] [extending the principle in *Bajakajian*, to due process claims of excessive punishment in civil cases, holding that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards."]; *People v. Cromer, supra,* 24 Cal. 4th 889, 901 [requiring *de novo* review of a trial court's determinations related to unavailability of a witness pursuant to the Sixth Amendment's Confrontation Clause]; *People v. Majors* (1998) 18 Cal. 4th 385, 417 (1998) [applying *de novo* review to the issue of whether prejudice arose from juror misconduct]; *People v. Jones* (1998) 17 Cal.4th 279, 296 [applying *de novo* review to a trial court's determination of the voluntariness of a confession]; *People v. Mickey* (1991) 54 Cal. 3d 612, 649 [reviewing the validity of a *Miranda* waiver *de novo*].) Second, *Montgomery* makes clear that *Miller's* inquiry extends beyond factual review to impose substantive constitutional limitations on sentencing

discretion. The Court explained, "'even the use of impeccable factfinding procedures could not legitimate a verdict' where 'the conduct being penalized is constitutionally immune from punishment.'" (*Montgomery, supra*, 136 S.Ct. at p. 730.) "A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law." (*Id.* at p. 731.) Thus, while the appellate court may view the "underlying disputed facts . . . in the light most favorable to the judgment," the court must apply *de novo* review in determining whether, based on those facts and considered in light of the *Miller* factors, the juvenile is one of the rarest individuals who is irreparably corrupt or permanently incorrigible such that an LWOP sentence is not cruel or unusual. (See, e.g., *People v. Em* (2009) 171 Cal.App.4th 964, 971 [applying abuse of discretion review to the underlying factual findings, but *de novo* review to the Eighth Amendment challenge].)

Here, the Second Appellate District applied the highly deferential abuse of discretion standard and concluded that the trial court did not "exceed[] the bounds of reason" to uphold the trial court's finding that consecutive sentences of LWOP were not disproportionate. (Opinion, p. 43.) By applying this highly deferential standard of review, the Court of Appeal essentially rubber-stamped the superior court's deficient analysis, and it failed to consider whether the facts viewed in light of *Miller* and *Montgomery* establish that appellant is one of the rarest juveniles whose crimes reflect irreparable corruption or permanent incorrigibility such that

imposing LWOP is not cruel or unusual in violation of the Eighth Amendment. This standard of review is not sufficient to ensure compliance with *Miller* and *Montgomery* and protect against unconstitutional sentences.

C. Since the Trial Court Failed to Make a Finding that Appellant Was One of the Rarest Juveniles Who Is Irreparably Corrupt or Permanently Incorrigible, Appellant's Sentence Violates the Eighth Amendment and Must be Reversed

Here, the trial court considered appellant's age at the time of the offense (16RT 6633), found that there was no evidence presented relevant to the other *Miller* factors (16RT 6633-6634), the crimes involved "great violence," "viciousness," the victims were "vulnerable," appellant was "not induced to participate" in the offense, appellant "threatened a witness," the crime was carried out in a "sophisticated" manner, and the shooting was a "senseless" crime on "behalf of criminal street gang." (16RT 6634.) The court then concluded, "after having considered all the circumstances, that if a sentence of LWOP is imposed, such sentence would not raise an inference of gross disproportionality under the Eighth Amendment when taken into consideration with the previous factors mentioned." (16RT 6635-6636.)

The court did not even attempt to answer the ultimate questions posed by *Montgomery* and *Miller*, namely, whether appellant was among the very rarest of juvenile offenders whose crimes reflect permanent incorrigibility or irreparable corruption. (See, *Tatum v. Arizona, supra*, 137 S.Ct. At pp. 11, 12; *Adams v.*

Alabama, supra, 136 S.Ct. at p. 1800.) Rather, the court simply considered appellant's age and the facts of the crime to determine, on balance, that a sentence of LWOP was not disproportionate. Thus, appellant's sentence violates the Eighth Amendment and requires reversal. On remand, the trial court must answer, and answer correctly, whether appellant is one of the rarest of juveniles who is irreparably corrupt or permanently incorrigible or whether he is like the vast majority of juveniles whose crime reflects transient immaturity.

CONCLUSION

For all the foregoing reasons, reversal of appellant's sentence is required and the matter should be remanded for a *Miller* hearing wherein the court applies the presumption against LWOP, holds the prosecution to its burden, permits appellant the opportunity to rebut any evidence presented by the prosecution, and makes a finding whether appellant is one of the vast majority of juveniles who is transiently immature or whether he is among the rarest of juvenile offenders who is irreparably corrupt or permanently incorrigible.

Dated: May 2, 2017 Respectfully submitted,

/s/

JENNIFER L. PEABODY
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

The text of this brief consists of 13,567 words as counted by the WordPerfect program used to generate this brief.

Dated: May 2, 2017

/s/

JENNIFER PEABODY
Attorney for Appellant Mendoza

DECLARATION OF SERVICE BY MAIL & ELECTRONIC SERVICE

I, the undersigned, declare that I am over eighteen (18) years of age, and not a party to the within cause; my business address is 617 South Olive Street, Suite 810, Los Angeles, CA 90014; that on May 2, 2017, I served a copy of the within **APPELLANT MENDOZA'S OPENING BRIEF ON THE MERITS** on the interested parties by placing them in an envelope (or envelopes) addressed respectively as shown in the attached service list.

Each said envelope was then, on May 2, 2017, sealed and deposited in the United States mail at Los Angeles, California, the county in which I maintain my office, with postage fully prepaid. I further declare that on May 2, 2017, I electronically submitted a copy of this document to the California Supreme Court on its website at http://www.courts.ca.gov/24590.htm in compliance with the court's Terms of Use; and I electronically served a copy of the same above document from electronic notification address peabody198746@gmail.com to the following entities' electronic notification addresses:

California Appellate Project, capdocs@lacap.com

Attorney General, docketingLAawt@doj.ca.gov

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 2, 2017 at Los Angeles, California.

/s/
MICHELLE CARLOS

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