IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. LUIS ANGEL GUTIERREZ Defendant and Appellant	No. S206365 (Second Appellate District, Division Six, No. B206365) (Ventura County Superior Court, No. 2008011529)

On Appeal from a Judgment of the Ventura County Superior Court
The Honorable Patricia M. Murphy, Judge Presiding

AMICUS BRIEF OF PACIFIC JUVENILE DEFENDER CENTER AND YOUTH LAW CENTER ON BEHALF OF APPELLANT LUIS ANGEL GUTIERREZ

L. Richard Braucher
730 Harrison Street, Suite 201
San Francisco, CA 94107
Telephone (415) 495-3119
State Bar No. 173754
rbraucher@fdap.org
Attorney for Amicus Curiae Pacific Juvenile Defender Center on behalf of Defendant and Appellant

Susan L. Burrell, Staff Attorney
State Bar No. 74204
200 Pine Street, Suite 300
San Francisco, CA 94104
(415) 543-3379, ext. 3911
sburrell@ylc.org
Attorney for Amicus Curiae Youth Law Center on behalf of Defendant and Appellant

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Amici curiae hereby adopt the Summary of Issues and Facts set forth in the Opening Brief on the Merits filed by Counsel for Defendant and Appellant, beginning at page 4.

ARGUMENT

I. LUIS' SENTENCE TO LIFE WITHOUT THE POSSIBILITY OF PAROLE VIOLATES *MILLER V. ALABAMA* BECAUSE IT WAS A MANDATORY SENTENCE AND BECAUSE THE TRIAL COURT DID NOT CONSIDER THE SPECIFIC YOUTH-RELATED MITIGATING CHARACTERISTICS *MILLER* DEMANDS

A. The Eighth Amendment Prohibits Mandatory Sentencing of Juveniles to Life Without Parole

In *Miller v. Alabama*, the Supreme Court held that a mandatory sentence of life without the possibility of parole for juvenile offenders violates the Eighth Amendment's proscription against cruel and unusual punishment. (*Miller v. Alabama* (2012) ___U.S. ___, ___, 132 S.Ct. 2455, 2475.) *Miller* explained that mandatory life without the parole schemes "prevent those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change' [citation] and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." (*Miller,* 132 S.Ct. at 2460.)

Under California's statutory scheme[1] life without the possibility of parole is the "presumptive punishment," and is "generally mandatory," affording the sentencing court

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[1] California Penal Code section 190.5 provides: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, *shall* be confinement in the state prison for *life without the possibility of parole or, at the discretion of the court, 25 years to life*." (§ 190.5(b) (emphasis added).)

only "circumscribed discretion" to overcome that presumption. (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1141-1143.) This "poses too great a risk of disproportionate punishment" (*Miller* at 2469), and runs afoul of the Eighth Amendment.

B. In This Case the Parties and the Court Treated Section 190.5 as Mandatory

While Section 190.5 seemingly affords discretion for a sentencing court to impose a 25 to life sentence in lieu of life without the possibility of parole, this Court has long interpreted the statute as mandatory. *People v. Guinn, supra,* 28 Cal.4th 1130, held that courts "*must*" impose life without the possibility of parole 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 (emphasis 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.) Here, at the time of sentencing, the court, the prosecutor, and Luis' own lawyer all appeared to believe that life without the possibility of parole was the mandatory punishment for Luis.[2] The prosecutor twice urged that a sentence of life without the possibility of parole was required by Penal Code section 190.5. At the sentencing hearing, he stated:

> "With respect to the legal arguments, that also is set forth in the law, given [sic] no discretion to either counsel or the Court with respect to the sentence that I should

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[2] Similarly, just as this brief was being submitted, the Attorney General conceded in *People v. Ramirez* that the trial court in that case apparently believed that Section 190.5 was mandatory. The Court of Appeal for the Fourth Appellate District remanded the case for consideration, under *Miller*, of "how children are different, and how those differences *counsel against irrevocably sentencing them to a lifetime in prison.*" (*People v. Ramirez* (Sept. 11, 2013, G044703) ___ Cal.4th __, quoting from *Miller* at p. 2469, italics added in *Ramirez*.)

> say is richly deserved by this defendant and his actions as determined by the jury." (4 RT 868, bracketed notation added.)

When defense counsel nonetheless asked for a 25 years to life sentence, the prosecutor said, "I just don't see any legal authority for what the defense is asking. Albeit, it might just be an open argument. But there is no legal authority with respect to the sentence requested." (4 RT 872.)

Luis' own counsel, a "new" attorney at the time of sentencing, presented no evidence at the sentencing hearing. (4 RT 862). He gave an argument so brief it can be read from the transcript in slightly more than three minutes. (4 RT 869-872.) Given the gravity of the potential consequences in this case, counsel's failure to present evidence that could have swayed the court toward 25 years to life suggests that he, too, believed that a life without the possibility of parole sentence was required under Section 190.5, and that his request for 25 years to life was a pro-forma exercise.

The court claimed to have considered Luis' age, but never looked at what that meant in terms of immaturity or other personal characteristics would have impacted Luis behavior or that had a bearing on the sentence. In fact, the court discounted the probation officer's report that Luis scored low on assessment for future recidivism, saying that the assessment should be done when he is much older. (4 RT 871.) Instead, the court focused on the crime:

> "And I have considered all the legal options that are limited for the Court with this conviction, but I have considered all of them and there are a number of things about the crime itself that in my view warrants life without the possibility of parole, notwithstanding the defendant's age." (4 RT 873.)

The court concluded:

"...I am absolutely convinced at this stage of the proceedings that life without the possibility of parole is the only thing that the court can do that could redress the amount of violence that was inflicted in this case." (4 RT 874.)

Because it was unable to look beyond the nature of the offense, the court, also contrary to *Miller*, never undertook an analysis of the actual impact of youthfulness, substance use or other personal characteristics of the young defendant before it. For example, as discussed extensively at Argument II, *post*, it never considered the inextricable impact of language and culture.

C. In This Case, the Court Did Not Consider the Specific Youth-Related Mitigating Characteristics Required by *Miller*

Miller made it clear that a life without the possibility of parole sentence is an unalterable verdict about a juvenile offender's societal worth, which conflicts with a juvenile's potential for change. (*Miller*, *supra*, 132 S. Ct. at p. 2465, citing *Graham v. Florida,* supra, 560 U.S., at p. ___, 130 S.Ct., at p. 2030.) Courts *must* undertake an analysis that considers the offender as well as the offense in order to give the juvenile a meaningful opportunity to obtain release. (*Id.* at p. 2469.) Although the trial court mentioned Luis's age, it never got beyond considering age as simply a number. The court never related "the number" of age to the distinctive developmental characteristics and other mitigating features of youth, which *Miller* views as essential in the decision whether to condemn a juvenile to a lifetime in prison, with no possibility of parole: "[W]e *require* [a sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. [Fn.]" (*Miller,* 132 S.Ct.at 2469 (emphasis added).) A sentencing court must take account of

the "central considerations" that dramatically reduce a youthful offender's culpability. (*Miller* at 2466.) "[T]hat stage of life ... is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.' [Citation.]" It is a "'condition of life when a person may be most suspectible to influence and to psychological damage.' [Citation.] But these "'signature qualities' are all 'transient' [citation]" (*id.* at 2467), such that a juvenile offender has much greater "capacity for change" and prospects for rehabilitation than an adult convicted of a similar offense (*id.* at p. 2465).

The sentencing court in this case did none of what *Miller* so clearly demands. Then, as now, the adult sentencing rules do not even explicitly list youth as a mitigating factor (Cal. Rules of Court, rule 4.423(b)), much less focus the sentencing inquiry on the "'mitigating features of youth'" in determining whether the minor is that "'rare juvenile offender whose crime reflects irreparable corruption,'" as required by *Miller*. (*Miller* at p. 2468, 2469) Then, as now, California's "generally mandatory" sentencing scheme (*Guinn*, 28 Cal.App.4th at 1142) suffered from the same deficiencies the Supreme Court condemned in the mandatory statutes of Alabama and Arkansas: It did not require the sentencing court to give paramount weight to the specific "hallmark features" of youth, delineated in *Miller*, "among them, immaturity, impetuosity, and failure to appreciate risks and consequences." (*Miller*, 132 S.Ct. at 2468.) It did not require the sentencing court to "tak[e] into account the family and home environment that surrounds [the juvenile] – and from which he usually cannot extricate himself – no matter how brutal or dysfunctional." (*Ibid.*) Nor, then as now, did section 190.5(b) adequately account for the role of "familial or peer pressures." (*Ibid.*)

By interpreting the law as leaving the court with no discretion, and failing to provide such an analysis in this case, the court treated Section 190.5 as requiring a mandatory life without the possibility of parole sentence. Under *Miller*, the sentence violated the Eighth Amendment.

II. THE LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCE IN THIS CASE WAS CRUEL AND UNUSUAL UNDER THE CALIFORNIA CONSTITUTION

A. The California Constitution Requires That Sentences Be Proportional to the Offense and the Characteristics of the Individual Offender

The kind of Eighth Amendment offender-specific analysis called for under *Miller* is also required by the California Constitution. A punishment is "cruel and unusual" under our Constitution when it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, Cal. Const. Art. I, §§ 17, 24.) In determining if a punishment is so grossly disproportionate as to be deemed cruel and unusual, *Lynch* set forth three factors often used in determining the proportionality of a sentence, but noted that not all three must be established: (1) the nature of the offense and the offender's background; (2) punishment for similar offenses is other jurisdictions and (3) the punishment for more serious offenses. (*Lynch, supra,* 8 Cal.3d at pp. 425-428.)

In determining whether punishment in cases involving juvenile offenders is grossly disproportionate to the offender's individual culpability, this Court has called for courts to examine "such factors as his age, prior criminality, personal characteristics, and state of mind." (*People v. Dillon* (1983) 34 Cal.3d 441, 479.) Thus, in *Dillon*, a seventeen year-old was convicted of first degree felony murder for fatally shooting a marijuana grower while attempting to steal some of the marijuana. (*Id.* at pp. 477-489.) The defendant challenged his 25 years to life sentence through a proportionality analysis that addressed the nature of the defendant's crime *and* the nature of the defendant. This Court found that "at the time of the events herein defendant was an unusually immature

youth. He had had no prior trouble with the law, and, as in *Lynch* and *Reed,* was not the prototype of a hardened criminal who poses a grave threat to society." Further, the young defendant in *Dillon* ". . . largely brought the situation on himself, and with hindsight his response might appear unreasonable; but there is ample evidence that because of his immaturity he neither foresaw the risk he was creating nor was able to extricate himself." This Court found Dillon's sentence to be disproportionate to his culpability and thus constituted a "cruel and unusual" punishment. (*Ibid.*)

California courts are informed by federal constructions of the Eighth Amendment. (See, e.g., *People v. Dillon, supra,* 34 Cal.3d at 481-482, discussing and finding "instructive" the reasoning of *Enmund v. Florida* (1982) 458 U.S. 782; *In re Nunez* (2009) 173 Cal.App.4th 709, 724-733, discussing *Roper v. Simmons* (2005) 543 U.S. 551.) This is because "article I, section 6 [currently art. I, § 17], like the Eighth Amendment, is not a static document." (*People v. Anderson* (1972) 6 Cal.3d 628, 647; accord, e.g., *People v. Schueren* (1973) 10 Cal.3d 553, 560 fn. 8.) Like its federal counterpart,[1] this Court has prescribed that "'the evolving standards of decency that mark the progress of a maturing society' [citation]" must govern the state constitutional assessment of the proportionality of a punishment. (*Anderson* at 647-648; *People v. Clark* (1970) 3 Cal.3d 97, 99.) "Judgments of the nineteenth century as to what constitutes cruelty cannot bind us in considering this question any more than eighteenth

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[1] See *Graham v. Florida*, 130 S.Ct. at 2021, and prior cases cited there, applying "evolving standards of decency" analysis.

century concepts limit application of the Eighth Amendment." (*Anderson* at 647.)[2]

The recent trio of juvenile punishment opinions – *Roper v. Simmons*, *Miller v. Alabama* and *Graham v. Florida* – represent more than a shift in Eighth Amendment law. More fundamentally, *they reflect a further evolution of the "standards of decency" which must also guide state constitutional review of petitioner's juvenile LWOP sentence*. "'An ever-growing body of research in neuroscience and developmental psychology' [citation]" has illuminated inherent differences between minors' and adults' cognitive and behavioral characteristics. (*Miller*, 132 S.Ct. at 2464-2465 & fn. 5.)

> "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds" – for example, in "parts of the brain involved in behavior control." [Citation; fn.] .... [T]hose findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessen[] a child's "moral culpability" and enhance[] the prospect that, as the years go by and neurological development occurs, his "'deficiencies will be reformed.'" [Citations.]

(*Miller* at pp. 2464-2465.)

Modern scientific understanding of "the distinctive attributes of youth" has provided the primary impetus for the Supreme Court's re-examination of the proportionality of extreme punishments for youthful offenders (death in *Roper*, LWOP in

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[2] A subsequent constitutional amendment (art. I, § 27) abrogated *Anderson*'s per se holding invalidating California's death penalty. But section 27 did not otherwise alter the substance of state constitutional analysis of the proportionality of the punishment in an individual case. (*People v. Bean* (1988) 46 Cal.3d 919, 957; *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 808.) Most significantly for present purpose, section 27 did not displace "evolving standards of decency" as the constitutional measurement. And, because it solely concerned the overall constitutionality of the death penalty, section 27 has no bearing at all on juvenile LWOP issues.

Graham and *Miller*). (*Miller*, 132 S.Ct. at 2465.) Because those "evolving standards of decency" guide assessment of punishment under the California Constitution as well (*People v. Anderson*, 6 Cal.3d at 647-648), this Court has a similar and independent obligation to apply that contemporary medical and psychological understanding of juveniles' diminished culpability to evaluation of the proportionality of petitioner's punishment. Indeed, it is without question that state cruel and unusual punishment jurisprudence concerning juveniles has already evolved considerably along with that of the Supreme Court. (See, e.g., *People v. Caballero, supra,* 55 Cal.4th at pp. 268-269 (employing *Graham* and *Miller*, finding a 110-year-to-life sentence imposed on a juvenile convicted of non-homicide offenses was the functional equivalent of a life sentence without the possibility of parole and was invalid); *In re Nunez, supra,* 173 Cal.App.4th 709 (relying, in part, on *Roper*'s "[t]hree general differences" between juveniles and adults in declaring a 14-year-old's LWOP sentence for kidnapping for ransom was cruel and unusual under the state constitution); *People v. Mendez* (2010) 188 Cal.App.4th 47, 63, ("guided by the principles set forth in *Graham,*" finding cruel and unusual under the state constitution a sentence of 84 years to life imposed on a defendant who was 16 when he committed several non-homicide crimes).)

Had the court in this case performed the requisite proportionality analysis, a different sentence would have resulted. Its failure to consider Luis' personal characteristics may have resulted from its belief that life without the possibility of parole was required. Whatever the reason, the court failed to meaningfully consider the young man before it. While this case, like any case involving special circumstances, is a very

serious case,[3] the court did not consider significant factors and personal characteristics that compelled a different sentence.

B. Immaturity Clouded Luis' Judgment

As a teenager, Luis Gutierrez was uprooted from his life in Mexico, and brought to California to be with his father. He had gone only as far as the 9th grade in Mexico. Because he worked and held a steady job for most of the time he was here, he had no further formal education. He had no previous criminal record. His immaturity and lack of sophistication were apparent throughout the offense and in the period that followed. His behavior exhibited the kind of impulsiveness and immaturity typified by juvenile offenders, making them markedly different from adult offenders.

1. Adolescent Behavior is a Function of Biology

The fact of adolescence affects every aspect of life for a young person in their teenage years. The National Research Council characterizes adolescence as "a distinct, yet transient, period of development between childhood and adulthood characterized by

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[3] In *Roper v. Simmons, supra,* 543 U.S. at 556-557, the young perpetrators broke and entered into an older woman's home, bound her with duct tape and electrical wire, and threw her off a bridge. In *Miller*, the young man and his companion smoked marijuana and drank with a neighbor, and then stole the neighbor's wallet when he passed out. When the neighbor came to, Miller hit him repeatedly with a baseball bat, and then set fire to the man's trailer. The neighbor died of his injuries and smoke inhalation. (*Miller*, 132 S.Ct. at p. 2462.) The apparent callousness involved in those cases helped to illustrate the Court's point that, "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. (*Roper*, *supra*, 543 U.S. at p. 570.) And again, in *Miller*, the Court observed that in sentencing juveniles 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,* 132 S.Ct. at p. 2469.)

increased experimentation and risk taking, a tendency to discount long term consequences, and heightened sensitivity to peers and other social influences." (National Research Council, Reforming Juvenile Justice: A Developmental Approach (2013), p. 1.) The Council explains that adolescents differ from adults and children in three important ways that lead to differences in behavior:

> First, adolescents have less capacity for self-regulation in emotionally charged contexts, relative to adults. Second, adolescents have a heightened sensitivity to proximal external influences, such as peer pressure and immediate incentives, relative to children and adults. Third, adolescents show less ability than adults to make judgments and decisions that require future orientation. The combination of these three cognitive patterns accounts for the tendency of adolescents to prefer and engage in risky behaviors that have a high probability of immediate reward but can have harmful consequences. (*Id.* at p. 2.)

These cognitive patterns are related to the biological immaturity of the brain. Adolescents lack mature capacity for self-regulation because the parts of the brain that influence pleasure-seeking and emotional reactivity develop more rapidly than the part that governs self-control. (*Ibid.*) The parts of the brain involved in impulse control, planning and self-regulation are the very parts that become fully developed only in early adulthood.[4] Accordingly, adolescents act impulsively; focus more on the rewards than the risks of a particular course of action; and are less able than adults to envision the future and longer term consequences of their actions.[5] They also have a greater tendency

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[4] Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Review 339 (1992) p. 339; Irwin, Jr., *Adolescence and Risk Taking: How are They Related?* in Adolescent Risk Taking (Bell and Bell edits., 1993) p. 7; Giedd, et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neuroscience 861 (1999) pp. 861-863.

[5] Gardner and Herman, *Adolescent's AIDS Risk Taking: A Rational Choice Perspective*, in Adolescents in the AIDS Epidemic (Gardner, et al. edits., 1990), pp. 17, 25-26; Beyer,

than adults to make decisions based on emotions, such as anger or fear, rather than logic and reason.[6] In addition, adolescents are more susceptible than adults to negative influences in their environment. Because their living circumstances are determined by their parents and families, they are vulnerable to family and neighborhood conditions that are beyond their control.[7]

2. Adolescence is Transitory and Youth Have the Capacity to Change

Maturity of judgment develops over time. It involves a complex combination of ability to make good decisions and social and emotional capability that adolescents do not yet possess.[8] But because adolescents are in the process of growing up both physically and mentally, they have a greater capacity than adults for positive change. Personality traits change significantly in the transition to adulthood, and the process of

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Recognizing the Child in the Delinquent, 7 Kentucky Child Rights Journal 16 (1999), pp. 16-17; Steinberg and Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 American Psychologist 1009 (2008), p. 1012.

[6] See Grisso, *What We Know About Youth's Capacities*, in Youth on Trial: A Developmental Perspective on Juvenile Justice (Grisso and Schwartz edits. 2003) pp. 267-269.

[7] Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in Youth on Trial: A Developmental Perspective on Juvenile Justice, *supra*, p. 47.

[8] Cauffman and Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behavioral Sciences and the Law 741 (2000) pp.741-745; Steinberg, et al, *Age Differences in Sensation-Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Developmental Psychology 1764 (2008) pp.1764-1778; and Gardner and Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psychology 625 (2005) pp.625-635.

forming a personal identity is not completed until youth are in their early twenties.[9] In fact, adolescent criminal behavior often results from experimentation with risky behavior and not from moral deficiency or bad character.[10] Only a small proportion of youth who experiment with delinquent or criminal activities persist in such behavior into adulthood.[11] Moreover, research indicates that for most youth, the period of risky experimentation does not extend beyond adolescence, ceasing as identity becomes settled with maturity. (National Research Council, *Reforming Juvenile Justice, supra,* pp. 1-2.)

3. Adolescence Reduces Legal Culpability

The science of adolescence and its impact on behavior has not been lost on the United States Supreme Court or this Court. The High Court has long recognized that ". . . . youth is more than a chronological fact. . . ." and is a relevant mitigating factor. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 115.) This recognition has taken center stage as courts grapple with the phenomenon of juveniles being tried in the adult criminal

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[9] Roberts, et al., *Patterns of Means-Level Change in Personality Traits Across the Life Course*, 132 Psychological Bulletin 1 (2006), pp. 14-15; Steinberg and Schwartz, *Developmental Psychology Goes to Court*, in Youth on Trial: A Developmental Perspective on Juvenile Justice, *supra*, p. 27; Scott and Steinberg, *Rethinking Juvenile Justice* (Harvard Univ. Press 2008) p. 52; Steinberg et al., *The Study of Developmental Psychopathology in Adolescence: Integrating Affective Neuroscience with the Study of Context*, in Developmental Psychopathology, vol. 2: Developmental Neuroscience (Cicchetti and Cohen edits., 2d ed. 2006) p. 727.

[10] Moffit, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychological Review 674 (1993) pp. 686, 690; Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Review, *supra*, pp. 366-367.

[11] Steinberg and Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, *supra,* pp. 1014-1015; Moffit, Adolescent-*Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychological Review, *supra*, pp.685-686.

justice system. Four times in the past ten years, the United States Supreme Court has recognized that juveniles must be treated differently from adults in sentencing or in handling by law enforcement

In *Roper v. Simmons, supra,* 543 U.S. at 578, the High Court held that no one under the age of 18 at the time of the crime may receive the death penalty. Five years later, in 2010, the Court held in *Graham v. Florida, supra,* 130 S.Ct at 2034, that juveniles who commit non-homicide offenses may not receive life without the possibility of parole. In 2011, the Court held, in *J. D. B. v. North Carolina* (2011) 564 U.S. ___, 131 S. Ct. 2394, 2406, that age must be taken into account in determining whether *Miranda* rights must be given. And most recently, in *Miller v. Alabama, supra,* ___U.S. ___, 132 S. Ct. 2455, 2460, the Court held that mandatory life without parole sentencing schemes for juveniles are unconstitutional. In California, this Court applied the recognized in those cases in striking down "de facto" life sentences for juveniles in *People v. Caballero, supra,* 55 Cal.4th at 268-269.

The cases are remarkably consistent in their reasoning about why juveniles are less culpable and less deserving of the most severe punishments. (*Roper v. Simmons, supra,* 543 U.S. at 569-570; *Graham v. Florida, supra,* 560 U.S. at ___, 130 S. Ct. at 2026-2028; *J.D.B. v. North Carolina, supra,* 564 U.S. at ___, 131 S. Ct. at 2403-2404; *Miller v. Alabama, supra,* ___U.S. at ___, 132 S.Ct. at 2464-2465.) The High Court's views were recently summarized in *Miller v. Alabama*: "First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. Children 'are more vulnerable ... to negative influences and outside

pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. .. And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].' (*Miller*, __ U.S. at __, 132 U.S. at 2464; citations omitted; bracketed material is in the opinion). In presenting these findings, the Court observed that research in developmental psychology and neuroscience continues to confirm and strengthen the Court's earlier conclusions. (*Miller*, *supra*, ___ U.S. at ___, 132 S.Ct. at 2465, fn. 5.)

4. The Hallmarks of Adolescence Were Evident in Luis' Behavior

At the time of the offense, Luis Angel Gutierrez was only seventeen years of age. He had gone only as far as the ninth grade in Mexico, and had undoubtedly suffered trauma in being brought to this country by "Coyotes" (4 RT 867, Report of the Probation Officer, hereafter "POR," 2.) Like many immigrant youth, he faced fragile living conditions, as well as socioeconomic, financial, geographic, linguistic, legal, cultural challenges. (See, American Academy of Pediatrics, *Providing Care For Immigrant, Homeless, and Migrant Children*, 115 Pediatrics 1095 (2005) pp. 1096-1100.) Because he did not speak English, Luis had limited capacity to interact with anyone outside the house where he lived with extended family. He was unsophisticated about the criminal justice system or dealing with law enforcement officials, having never before been arrested. (POR 3, 18.) While he had a job at Baja Fresh for some period of time, he lost it because of attendance problems – roughly coinciding with the onset of heavy drinking and drug use. (POR 2-3.) The record is replete with indications that he felt worthless

and discouraged about his life. (2 RT 256, II Miranda Interview - CT 602-605, POR 12.) The circumstances of his life, combined with immaturity and substance abuse, played a major role in what happened at the time of the offense and in his dealings with law enforcement afterward.

The prosecution theory of the case was that Luis waited until his Uncle Abel left for work and then went into the house to try to have sex with his aunt, and that he wound up killing her when she refused. (4 RT 756- 761.) Luis claimed that he came home drunk, got into an argument with his aunt about what he perceived as her "badmouthing" him to other people, and that it escalated into a physical confrontation during which he stabbed her and lay on top of her while both were unclothed. (POR 9; II Miranda Interview – CT 602-613, 661-674.)

Under either theory, Luis' perceptions of what was happening were exceptionally immature. Only a person completely unable to think into the future or engage in rational thinking would believe his aunt would want to have sex with him, or think he could get away with forcing her to do so in the bedroom of an extended family house where 10 people resided. Only a person limited by immaturity and inexperience would respond to perceived disrespect by resorting to violence. (1 RT 149.) Only a person completely unable to objectively consider his situation would commit a crime, leave a trail of blood drops through the house (2 RT 228-229), deposit his bloody clothing in the house (4 RT664), and then stay in the house to talk to family members while holding his bleeding hand. (1 RT 158, 2 RT 224.) In this regard, the offense in this case bears great similarity to the vast majority of homicides committed by young males. Most such homicides

result when altercations escalate, and in the heat of the moment, youth exercise poor judgment and decision-making, often fueled by the attribution of malevolent intent to others. (Heller, et al., *Preventing Youth Violence and Dropout: A Randomized Field Experiment* (National Bureau of Economic Research 2013), Working Paper 19014, pp. 4, 8-9.)

C. Luis' Immature Judgment Was Further Clouded by Alcohol and Drug Use

1. Luis Was Intoxicated at the Time of the Offense

It is impossible to understand what happened in this case without considering the impact of alcohol and drug use on Luis' behavior. Had the court considered these issues, a different result would have occurred. While substance use did not provide a legal excuse in the case, it helped to explain his behavior and, along with immaturity and cultural factors, demonstrated the cruelty of a life without the possibility of parole sentence in this case.

When blood was drawn from Luis at 10:40 a.m. on March 16, 2008, at Los Robles Hospital, he had a blood alcohol concentration (BAC) of 0.06%. (4 RT 673.) By all accounts, he had spent the night before partying at his cousin Erika's house, drinking beer during the party (2 RT 247, 257-258). Erika testified that she had told him he shouldn't be drinking alcohol. (2 RT 258.) The partiers were still there when Erika went to bed at 12:30 a.m. (2 RT 247-248.) The evidence indicated that the confrontation with Josephina occurred between 5:30 and 6:30 a.m. (I Miranda Interview 541, II Miranda Interview 607, 1 RT 155, 2 RT 203.)

The "burnoff" rate for alcohol metabolism varies depending on whether the individual is a moderate or heavy drinker, whether the person's stomach is empty or full, weight, and gender. People who are heavy drinkers metabolize alcohol more quickly, as do people with an empty stomach,[12] and heavier people. According to materials from the National Institutes of Health, "Heavy drinkers, for example, can have elevated rates of alcohol metabolism due to higher-than-normal concentrations of alcohol-metabolizing enzymes. Higher levels of these enzymes increase the burnoff rate. The average metabolism for a moderate drinker results in a decline in BAC of about 0.017 per hour, while a heavy drinker may have a decrease of 0.020 per hour. The range of metabolism rate per hour is from above 0.040 to below 0.010." (U.S. Dept. of Health & Human Services, National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, *Teachers Guide: Information About Alcohol*, § 5.2, <http://science.education.nih.gov/supplements/nih3/alcohol/guide/info-alcohol.htm> [as of Aug. 19, 2013].)

Extrapolating from the 0.06% blood alcohol reading at 10:40 a.m. on March 16, 2008, and assuming the later time for the confrontation of 6:30 a.m. (4 hours earlier), using the average metabolism rate for a moderate drinker, Luis would have had a blood alcohol level of 0.0128% (4 hours x 0.017 + 0.06) at the time of the offense. Using the burnoff rate for a typical heavy drinker, his blood alcohol level four hours earlier would have been 0.014 (4 hours x 0.02 + 0.06). Even using the lowest burnoff rate reported by

[12] Luis repeatedly spoke of being hungry and thirsty just before the offense (Miranda Interview, CT 575 – 577).

the National Institutes of Health, 0.010%, Luis would have had a blood alcohol level of 0.010% at the time of the confrontation (4 hours x 0.010% + 0.06). [13]

In fact, Luis' blood alcohol level may have been even higher, because the offense may have occurred as much as two hours earlier. The evidence was that the offense occurred sometime between 4:20 a.m., when Abel Gutierrez left the house (RT 203, 207), and 6:30 or 6:45 a.m., when Abraham Cordova heard the door to Josephina's room scrape (as it does when it is opened or closed), and observed Luis in the kitchen with his hand bleeding. (RT 155, 158.) Later that morning, Jose Mendoza found Josephina's body. (RT230.) The prosecutor argued to the jury that the offense had taken place before 6:45 a.m. (RT 757.

The Centers for Disease Control and Prevention chart on effects of alcohol impairment provides that at a BAC of 0.05%, typical effects include exaggerated behavior; loss of small-muscle control (including the ability to focus your eyes); impaired judgment; lowered alertness: and release of inhibition.[14] At a BAC of 0.08%, the typical effects include poor muscle coordination (balance, speech, vision, reaction time, and hearing); increased difficulty detecting danger, and impaired judgment, self-control, reasoning, and memory. These symptoms become more pronounced as the

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[13] The California Department of Alcohol and Drug Programs public information site states that the average person metabolizes about one drink per hour. (Cal. Dept. of Alcohol and Drug Programs, *Frequently Asked Questions: General*, <http://www.adp.ca.gov/Criminal_Justice/DUI/faqs.shtml> [as of Aug. 13, 2013].) Using this rule of thumb, as well, Luis was seriously inebriated at the time of the offense.

[14] As a point of reference, in California, it is illegal for persons under the age of 21 years to drive a vehicle with a blood alcohol level at a much lower level than that -- 0.01% or more. (Veh. Code § 23136.) At the time of the confrontation with Josephina, Luis had a BAC of at least ten times that amount.

BAC level increases. (U.S. Dept. of Health & Human Services, Centers for Disease Control and Prevention, *Effects of Blood Alcohol Concentration (BAC)*, <http://www.cdc.gov/Motorvehiclesafety/Impaired_Driving/bac.html> [as of Aug. 19, 2013.].) Because of these impairments in perception, judgment and self-control, alcohol is well-recognized as a significant contributor to sexual assault. (Abbey, et al., *Alcohol and Sexual Assault,* U.S. Department of Health & Human Services, National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism (undated), http://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm [as of Aug. 19, 2013].)

Even using the most conservative estimates of BAC at the time of the altercation in this case, Luis was substantially impaired. Whether the incident escalated because Josephina would not have sex with him or because of his anger about her perceived belittling of him to others, he lost control, was unable to reason his way out of the situation, and repeatedly stabbed her in a rage. Although he told a series of stories to the detectives about what had happened, when he finally admitted stabbing her, it was surely also true that there were blank spots in his memory as a result of alcohol impairment. It is very common for adolescent drinkers to have memory lapses or blackouts, sometimes with only a few drinks: ". . . . [A]lcohol produces detectable memory impairments beginning after just one or two drinks. As the dose increases, so does the magnitude of the memory impairments. Under certain circumstances, alcohol can disrupt or completely block the ability to form memories for events that transpire while a person is intoxicated, a type of impairment known as a blackout." (White, *What Happened? Alcohol, Memory Blackouts, and the* Brain, U.S. Dept. of Health & Human Services, National Institute on

Alcohol Abuse and Alcoholism 27 Alcohol Research & Health 187 (2003) 187-194, <http://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm> [as of Aug. 19, 2013].) In the light of day, it was difficult for Luis to put together what had happened.

2. In the Period Leading Up to the Offense, Luis Had Abused Methamphetamines, Cocaine and Alcohol

Apart from his intoxication on the night of the offense, Luis informed the probation officer that he had been using methamphetamine and cocaine on a regular basis. This was in addition to the 14 to 20 beers he typically consumed at parties. (POR 2-3.) And although the toxicology screen did not confirm this, Luis told the detectives that he had used methamphetamine on the night of the offense. (Miranda Interview II - CT 459, POR 7.)

Chronic methamphetamine use is associated with mood disturbances, and violent or aggressive behavior. (U.S. Dept. of Health & Human Services, National Institutes of Health, National Institute on Drug Abuse, *Methamphetamine: Abuse and Addiction*, Research Report Series (2006), p. 5, <http://www.drugabuse.gov/publications/research-reports/methamphetamine-abuse-addiction> [as of Aug.13, 2013].) On a short term basis it is associated with reduced inhibitions, impaired judgment and risky sexual behavior. (*Id.*, p. 6.) And although small amounts of cocaine typically result in increased energy and euphoria, larger amounts can lead to bizarre, erratic, and violent behavior. Some cocaine users report feelings of restlessness, irritability, anxiety, panic, and paranoia. (U.S. Dept. of Health & Human Services, National Institutes of Health, National Institute

on Drug Abuse, *Cocaine: Abuse and Addiction*, Research Report Series (2010), p. 3, http://www.drugabuse.gov/publications/research-reports/cocaine-abuse-addiction [as of Aug.19, 2013] .) Long term effects similarly include panic attacks, and paranoia—sometimes with a full-blown psychosis, in which the individual loses touch with reality and experiences auditory hallucinations. (*Ibid.*)

Luis' alcohol and drug use may also have masked underlying mental health issues. Early in the proceedings, the court approved an order for Seroquel for Luis for a period of 180 days. (CT 19.) Seroquel is used in the treatment of schizophrenia, bipolar disorder, and major depressive disorder. (U.S. Food and Drug Administration, *Medication Guide: Seroquel (SER-oh-quel) (quetiapine fumarate) Tablets*, http://www.fda.gov/downloads/Drugs/DrugSafety/ucm089126.pdf [as of Aug. 19, 2013].) Warning signs of psychological distress are sometimes not recognized as such and are neglected or punished by family members. This may contribute among other things, to isolation, or a turn to alcohol or drug abuse as a form of self-medicating to reduce pain and emotional anxiety. (Holdman and Seed, *Cultural Competency in Capital Mitigation* (2008) 36 Hofstra L.Rev. 833, 915.) This was a significant matter that should have been explored and considered in the sentencing process.

3. Substance Abuse Is Treatable and Typically Wanes as Youth Mature

Oddly, the court recognized that Luis had a serious substance abuse problem (4 RT 875), but failed to consider it in mitigating the sentence. This failure went to the very heart of what ought to be considered in choosing between life without the possibility of

parole and 25 years to life for a teenage defendant. Luis' intoxication on the night of the offense and substance abuse in the period leading up to it were critically important factors that merited the court's full attention in the sentencing process.

With respect to the offense itself, Luis' intoxication helps to explain the repeated stabbings and clumsy attempts to cover up afterwards. But more importantly, with respect to sentencing, substance abuse is something that can be changed, and something that generally *does* change as young people mature. (O'Malley, *Maturing Out of Problematic Alcohol Use,* U.S. Dept. of Health & Human Services, National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism (undated) <http://pubs.niaaa.nih.gov/publications/arh284/202-204.htm> [as of Aug. 19, 2013].) In fact, studies of adolescent binge drinkers have found that the onset of alcohol dependence peaks by the age of 18 and rapidly declines after 25 years (Hahm, et al., *Binge Drinking Trajectories from Adolescence to Young Adulthood: The Effects of Peer Social Network* (2012) 47 Substance Use and Misuse 745, 747.) Researchers have developed successful multi-pronged treatment programs that may include cognitive behavior therapy, motivational enhancement therapy, or family-based interventions to medications. (U.S. Department of Health & Human Services, National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, *A Developmental Perspective on Underage Drinking*, Alcohol Alert No. 78 (2009), <http://pubs.niaaa.nih.gov/publications/AA78/AA78.htm> [as of Aug. 19, 2013].) Luis' abuse of alcohol and drugs was not an immutable or permanent character trait.

In fact, Luis was already concerned that others perceived him as having a substance abuse problem. It upset him that his aunt and uncle said bad things about him to their children. (Miranda Interview II - CT 602-605, 612.) He didn't want his father to see him drunk on the night of the offense. (Miranda Interview II – CT 529-530.) In his memory, the altercation with Josephina began when she said that the family was ashamed of him. They were embarrassed about me because he was "a drunk" and a drug user. (Miranda Interview II – CT 612.) He didn't like feeling that way. Shortly before the party on the night of the offense, Luis told his cousin Erika that he was going to go back to Mexico. He said he was going to go back because he did not have a job, and he said he had nothing to do here, that it was best for him to go back to Mexico." (2 RT 256) These are the glimmerings of a person who has the desire and capacity to change himself. He didn't like the situation he was in and wanted to make things different.

D. The Court Failed to Recognize the "Incompetencies Associated with Youth" or the Impact of Culture on Luis' Behavior After the Offense

In *Miller v. Alabama*, the Supreme Court spoke of the "incompetencies associated with youth" – not just in relation to the offense, but also in relation to their behavior as defendants. (*Miller*, *supra*, 132 S.Ct at p. 2468.) The Court disapproved mandatory sentencing for juveniles, in part, because it ignores that the young person might have been charged and convicted of a lesser offense if not, for example, his inability to deal with police officers or prosecutors (including on a plea agreement), or his incapacity to assist his own attorneys." (*Ibid.*) Ironically, in this case, the court did not consider the

truly relevant incompetencies, and instead focused on culturally biased interpretations of Luis' behavior and nonverbal expression.

Luis suffered from the "incompetencies associated with youth." He was uneducated – again, having gone only to the 9th grade in Mexico. The impact of his youth and lack of sophistication were exacerbated by language. Luis grew up speaking Spanish as his primary language and used an interpreter throughout the proceedings. Although the court denied counsel's motion to exclude his statements to law enforcement, even a cursory reading of the interrogation transcript reveals a young man who struggled to understand what was happening. The interrogation was "double teamed" by a Spanish speaking and English speaking officer. At several points in the transcript, the questioning goes relentlessly on for four or five pages, adding fact upon fact to what the officer's assert happened, without giving Luis a chance to say little more than "What?" (Miranda Interview II – CT 628, 656-659.) He asked repeatedly to see his father during the interrogation. (Miranda Interview II 560, 600, 630.)

Luis was young, and unsophisticated about the situation in which he found himself. A mature defendant might have insisted upon talking to an attorney before he was interrogated in such a serious case. A mature defendant might have been less likely to tell fantastic stories that could easily be disproved. A mature defendant could have helped his attorney to develop mitigating evidence that could have resulted in a less onerous sentence. Instead, Luis Angel Gutierrez suffered from the "incompetencies associated with youth." The court failed to consider the very obvious impact of

immaturity, lack of knowledge about the system, and language in the way Luis presented himself.

The court also failed to recognize that Luis" behavior, particularly after the offense, was very much in sync with what would be culturally expected of a young man from Mexico. It is well recognized that:

> Culture influences a client's interaction with law enforcement during and after arrest, weighs on the reliability and voluntariness of a client's statement, affects a client's expressions of remorse, his conduct during incarceration or probation, his receptiveness to a plea opportunity, his understanding of judicial proceedings (including the roles of the judge, the prosecutor, and the defense attorney), his demeanor in court, his relationship to the defense team, his trust of authority figures, and his mental health evaluations. Culture also affects legal determinations of competency, of justifications or excuses for criminal offenses, and of the validity of confessions, waivers, and pleas. Certainly not least, culture informs in myriad ways the social history investigation and presentation of defense evidence in capital proceedings—including a client's relationship with codefendants or victims and barriers to disclosure such as shame, face, family expectations, suffering, hopelessness, and despair.

(Holdman and Seed, *Cultural Competency in Capital Mitigation* (2008) 36 Hofstra L.Rev. 833, 895-896.)

Thus, in other contexts, some of the very characteristics that were interpreted as negatives for Luis have been recognized as culturally driven for Latinos. These include *simpatia* - politeness and the avoidance of hostile confrontation; *personalismo* - the value of warm personal interaction; *respeto* - the importance of showing respect to authority figures; *familismo* - collective loyalty to extended family and commitment to family obligation; and *fatalismo* - the belief that individuals cannot do much to alter fate. (Peterson-Iyer, *Culturally Competent Care for Latino Patients: Introduction* (2008) Santa Clara University, Markkula Center for Applied Ethics

<http://www.scu.edu/ethics/practicing/focusareas/medical/culturally-competent-care/hispanic.html> [as of Aug. 13, 2013].) In this case, Luis' apparent lack of emotion or remorse may simply have reflected his native culture's sense of propriety in difficult situations, and it was manifestly unfair to read more into his expression or affect.

Also, facts such as Luis' failure to attend school when he came to the United States, mentioned by the court at sentencing (RT 871), must be viewed in a cultural context. A defendant's decision to drop out of school may not be a sign of lack of interest or ability, but rather a response to cultural role models who stress the need to work to support the family. (Holdman and Seed, *Cultural Competency in Capital Mitigation*, *supra*, p. 915.) In fact, Luis came to this country and held a steady job for most of the time his was in this country – something that is uncommon for American born youth of his age, but common in Mexico.

The court also failed to recognize the cultural context for body language and personal expression. The prosecutor elicited testimony and argued that Luis lacked remorse, was smiling inappropriately, or may have been smirking. (2 RT 291-292, 4 RT 782, 784.) The prosecutor argued this apparent lack of remorse at the time of sentencing: "I would also like to point out that not only after the crime was committed but after his conviction when he was interviewed by the probation officer, they detected a very cool, lack of remorse and at time jovial and joking spirit by the defendant when he's being interviewed by the arm of the courts after he had been convicted of the first degree murder with special circumstances." (4 RT 872.) The court similarly observed that "He offers no excuse." (4 RT 871.)

Although consideration of lack of remorse has been permitted in the adult criminal arena, the reality is that it is inherently difficult to assess the presence or absence of remorse because of subjectivity, deception, cultural values, developmental limitations, and psychological problems. (Ward, *Sentencing Without Remorse* (2006) 38 Loyola University Chicago Law Journal 131, 134.) There are also significant dangers or misinterpretation in cross-cultural reading of physical expressions or body language as an indicator of what the person actually feels. (Holdman and Seed, *Cultural Competency in Capital Mitigation, supra*, p. 890, fn. 40.) Cultural values in certain racial/ethnic minorities may prohibit displays of remorse, and that judges' own cultural values may prevent them from perceiving a valid expression of remorse from a member of a different racial/ethnic group. (Ward, *Sentencing Without Remorse*, *supra*, p. 136, citing at n. 28, Everett and Nienstedt, Race, *Remorse, and Sentence Reduction: Is Saying You're Sorry Enough?* (1999) 16 Just. Q. 99, 117–18.)

Certainly, in this case, involving a teenage, immigrant defendant who had never before been in trouble, both cultural and developmental factors affected the way he presented himself to the world. In fact, applying remorse as a sentencing factor for juveniles has been found inappropriate given the developmental limitations inherent in such offenders. (Ward, *Sentencing Without Remorse*, *supra*, p. 136; citing, at n. 27, Duncan, *So Young and So Untender: Remorseless Children and the Expectations of the Law* (2002) 102 Colum. L.Rev. 1469, 1526.)

Thus, in disapproving a lower court finding that a teenage defendant lacked remorse because he laughed when the prosecutor read statements that contradicted his version of events, the appellate court in *State v. Parker* noted:

> [W]hy [defendant] laughed is entirely speculative as far as the evidence shows. Some of the many possibilities are that he laughed out of mere nervousness or meanness, or because he was an immature adolescent in the toils of the law for the first time, or because he had no remorse for his crime. One thing is not speculative, though, but is known to everyone that has spent time in court is that defendants and other witnesses often laugh or smile at being contradicted."

(*State v. Parker* (1988) 92 N.C.App. 102, 105, 373 S.E.2d 558, 559.)

Also, some people look like they are smirking or smiling inappropriately when they are not. Former President George W. Bush was famously accused of smugness or arrogance because of his perceived smirking, particularly by people who did not agree with his political views. To the extent the court used Luis' body language and perceived emotions and failed to consider the factors that truly merited consideration as indicators for sentencing, it did Luis a manifest injustice.

E. The Court Failed to Consider the Particularly Grim Fate of Juveniles in Prison

The court also erred in failing to consider what would happen to Luis in prison if he received a sentence of life without the possibility of parole. In *Graham v. Florida*, the Supreme Court included the fate of such juveniles as part of its decision that the life without the possibility of parole sentences before it violated the Eighth Amendment. The High Court observed that "for a juvenile defendant, this sentence 'means denial of hope; it means that good behavior and character improvement are immaterial; it means that

whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.'" (*Graham v. Florida*, *supra*, 130 S.Ct at 2027, quoting from *Naovarath v. State* (1989), 105 Nev. 525, 526, 779 P.2d 944.) The Court noted, further, that "Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16–year–old and a 75–year–old each sentenced to life without parole receive the same punishment in name only." (*Graham,* 560 U.S at p, ___, 130 S.Ct. at p. 2028.) And finally, the Court concluded, recognized that by denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. In the Court's view, this was not appropriate in light of the young person's capacity for change and limited moral culpability. The Court concluded that, for juvenile offenders, who are most in need of and receptive to rehabilitation, "the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident." (*Graham,* 560 U.S at ___, 130 S.Ct. at p. 2029.)

This was especially so in Luis' case. He was involved in a single tragic offense fueled by alcohol and substance abuse. He had no history of violence and already wanted to improve himself. But California's prison system is particularly grim for juveniles sentenced to life without the possibility of parole. Educational, rehabilitative, vocational, and other self-improvement programs ordinarily available to most inmates are often denied to those serving life without parole, including those sentenced as juveniles. (Human Rights Watch, *"When I Die They'll Send Me Home," Youth Sentenced to Life*

without Parole in California (2008) p. 56.) This is partly because there are not enough programs to accommodate everyone who wants them, and priority is given to inmates who are "going home." (*Ibid.*) Also, program availability varies greatly from prison to prison, so slots for certain kinds of programs may be especially scarce in some locations. (*Ibid.*) Indeed, when the Legislative Analyst's Office studied the California prison system, it found that less than a third of prison inmates were in any kind of educational or vocational program; only about 10% were in academic programs, and 15% of the state's inmates were on waiting lists. (Legislative Analyst's Office, *From Cellblocks to Classrooms: Reforming Inmate Education To Improve Public Safety* (2008), http://www.lao.ca.gov/2008/crim/inmate_education/inmate_education_021208.aspx [as of Aug. 20, 2013].)

In addition, California's prison system automatically give inmates with life without the possibility of parole sentences the highest level of security classification, irrespective of age or behavior, and this puts youth at a disadvantage in qualifying for some programs. Although it is theoretically possible to attain a lower level classification, it make take years for that to happen. (Human Rights Watch, *"When I Die They'll Send Me Home," supra*, at p. 57.) Further, California's prison system suffers from overcrowding and frequent lockdowns that serve as an additional impediment to youth seeking educational and rehabilitative programs. (*Id.*, at p. 58.) Violence is common, and young inmates find themselves in situations in which they must "prove" themselves in order to survive in the prison culture. (*Id.*, at pp. 54-55.) This abysmal situation leaves youth serving life without the possibility of parole sentences in an untenable situation.

Although they are at the very best point in their lives to work on education, vocational skills, and other forms of self-improvement, they have virtually no opportunity to pursue those things. Youth serving long sentences report that, even though substance abuse played a major role in their offense, they are unable to access substance abuse treatment. (*Id.*, at p. 59.) These were issues that should have been considered by the court in considering Luis' case.

Conclusion

This case involved a single act of extreme violence committed by an intoxicated teenager with no criminal record. His relatives struggled to understand how this could have happened. (4 RT 863-864, 866.) The probation officer's assessment was that he was at relatively low risk of committing a new sexual offense. (POR 17 .) Nothing in the record suggested that Luis suffers from "clearly unsalvageable depravity." (*Miller*, 132 S. Ct. at p. 2469.) The factors most contributing to his out of control behavior in the offense – immaturity and substance abuse – are things that generally change with maturity.

The trial court in this case failed to consider whether "as the years go by and neurological development occurs, his deficiencies will be reformed." (*Miller*, 132 S.Ct. at p. 2465.) Whether this was because the court viewed section 190.5 as mandatory, or simply failed to consider the characteristics of the offender, a sentence of life without the possibility of parole was improper. As *Miller* observed, "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." (*Ibid.*) While a state is not

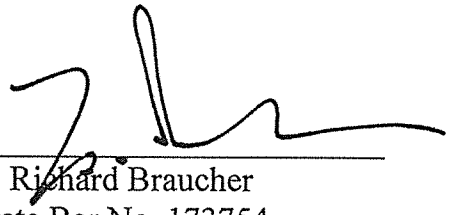
required to provide eventual freedom, "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" should be offered. (*Id.* at p. 2469.)

For each and all of the foregoing reasons, we urge the Court to find that the life without the possibility of parole sentence in this case was improper.

September 20, 2013

Respectfully Submitted,

PACIFIC JUVENILE DEFENDER CENTER



L. Richard Braucher
State Bar No. 173754

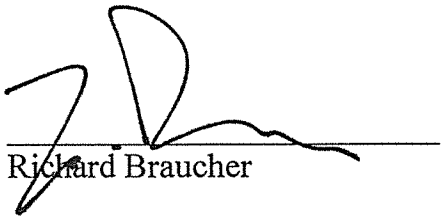
YOUTH LAW CENTER
Susan L. Burrell, Staff Attorney
State Bar No. 74204

Attorneys for Amici Curiae
on Behalf of Defendant and Appellant

CERTIFICATE OF WORD COUNT

I hereby certify that the Amicus Brief contains 9610 words according to the word count of the Word computer program used to prepare the document.

September 20, 2013



Richard Braucher

DECLARATION OF SERVICE BY MAIL

Re: People v. Luis Angel Gutierrez Case No. S206365

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business address is 730 Harrison Street, Suite 201, San Francisco, CA 94107. On September 20, 2013 I have caused to be served a true copy of the attached **AMICUS BRIEF OF PACIFIC JUVENILE DEFENDER CENTER AND YOUTH LAW CENTER ON BEHALF OF APPELLANT LUIS ANGEL GUTIERREZ**on each of the following, by placing same in an envelope(s) addressed as follows:

Kamala Harris
Attorney General of California
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Clerk of the Superior Court
Hall of Justice
800 S. Victoria Ave.
Ventura, CA 93009

Jean Matulis
Attorney at Law
P.O. Box 1237
Cambria, California, 93428

Office of the District Attorney
800 S. Victoria Ave.
Ventura, CA 93009

Clerk of the Court of Appeal
Second Appellate District, Division Six
200 E. Santa Clara St.
Ventura, CA 93001

Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in San Francisco, California, on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 20, 2013, at San Francisco, California.

Jean Veane

Declarant