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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LUIS ANGEL GUTIERREZ, Defendant and Appellant.	2d Crim. No. B227606 (Super. Ct. No. 2008011529) (Ventura County)

During the course of a sexual assault, Luis Angel Gutierrez murdered his aunt by stabbing her 28 times. A jury convicted him of first degree murder with the special circumstances finding that the murder was committed during the commission of a rape or attempted rape. (Pen. Code, §§ 187, subd. (a); 189, 190.2, subd. (a)(17)(C); 261.)[1]. The jury found that he personally used a deadly weapon (§ 12022, subd. (b)(1)) and was over 14 years of age at the time of the offense (Welf. & Inst. Code, § 602, subd. (b)(1)). Appellant was sentenced to life without possibility of parole (LWOP) plus one year on the weapon enhancement (§ 12022, subd. (b)(1)).

He appeals contending that the trial court erred in finding that he waived his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].) He also challenges the LWOP sentence. We affirm.

[1] All statutory references are to the Penal Code unless otherwise stated.

Facts

The victim, Josefina Gutierrez (Josefina), lived in Simi Valley with her husband, sons, and other relatives including appellant.

At 4:20 a.m., on March 16, 2008, Josefina's husband, Abel Hernandez, went to work leaving Josefina asleep in their bed. Appellant took his shoes off and entered the house. Abraham Gutierrez, Abel's nephew, heard someone open Josefina's bedroom door which was unusual because Josefina normally slept in on Sundays. Thereafter, he saw appellant in the kitchen. Appellant's right hand was bleeding. Appellant tried to hide the injury with his jacket sleeve and said that he hurt his hand in a fight. Appellant left about five minutes later.

Jose Luis Mendoza, Josefina's brother, saw blood on the floor and the bedroom door ajar. Josefina was naked, face down on the floor with her legs spread apart. She had a large knife protruding from her back. There were fresh bruises on her face and body and stab wounds to the back, shoulder, hands, chest, face, and neck.

Appellant admitted himself to Los Robles Hospital. Thereafter, he spoke to the police. He said that a Hispanic gang member stabbed him in the hand at a party in Moorpark. A sexual assault nurse examiner found blood on the head of appellant's penis. Josefina's DNA was on his scrotum. Appellant had dried blood all over him.

A crime scene investigator found bloody handprints on Josefina's thighs, blood on the bedroom walls and ceiling, and blood spatter and smears in the bathroom. Appellant's DNA was on Josefina's perianal area, her buttocks and inner thighs, and on the bathroom wall by the light switch. Officers searched appellant's bedroom and found bloody socks, shoes, and jeans. Blood was on the outside and inside of appellant's car and a bloodstained dress shirt was in the car.

Appellant underwent hand surgery and was hospitalized. He was released to the custody of the Simi Valley Police Department three days later on March 19, 2008. Officer Lincoln Purcell read appellant his *Miranda* rights in the Spanish language. Appellant nodded his head up and down after each advisement indicating he understood his rights. Officer Purcell did not, however, expressly ask appellant to waive the

M*iranda* rights. Nevertheless, appellant showed a willingness to discuss the case and did so for over two hours. Appellant gave conflicting accounts of what happened.

Appellant told Officer Purcell that he attended a birthday party at Erika Gutierrez's house and purchased methamphetamine. After leaving the party 10 to 15 men beat and stabbed him. Appellant sustained a cut to his hand and walked home.

Officer Purcell told appellant that the police had this house under surveillance because of prior drug transactions. He told appellant that the police did not see a group of men harm anyone. Purcell then changed the subject and asked why his blood was in Josefina's bedroom.

Appellant changed his story and said that he arrived home at 5:30 a.m. and knocked on Josefina's bedroom door. The two argued and Josefina attacked him with a knife. Appellant grabbed the knife but Josefina cut him and then stabbed herself.

Officer Purcell told appellant that Josefina was stabbed in the back multiple times before she was stabbed in the stomach. Appellant said that Josefina stabbed herself to falsely incriminate him. After Josefina cut his hand, he grabbed the knife and stabbed her in the back two times. Appellant denied stabbing Josefina in the face or neck or having sex with her.

Officer Purcell asked why blood was on appellant's penis. Appellant said that Josefina sexually assaulted him, took off her nightshirt, and had appellant remove her bra. Appellant fell on top of her after she pulled his pants down. Appellant did not know if his penis penetrated her vagina but he did recall pulling his pants back up and stabbing Josefina before leaving.

Implied Miranda Waiver

Appellant contends that the trial court erred in finding that he impliedly waived his *Miranda* rights (*Miranda v. Arizona*, *supra*, 384 U.S. 436 [16 L.Ed.2d 694]). The *Miranda* admonition and two-hour-forty-minute police interview was videotaped. The trial court reviewed a DVD and transcript of the interview and found that appellant, "by his comments, by his -- by the language he used, by the body language that he demonstrated that he executed a free and deliberate choice to discuss the issue with the

police officers. It was obvious to me that he understood his rights based on his responses to the questions, [and] based on his behavior and his conduct. Based on his indication to stop the interview for the five-minute period, he demonstrated to me satisfactorily that he understood that he was in control of the situation, and the officers complied with his request. [¶] So it's obvious to me that the *Miranda* warnings were properly given, that the Defendant understood the rights that he was given and that he chose to discuss the matter with the police officers, notwithstanding those rights that were given to him."

The trial court considered appellant's age and physical condition and that appellant was "on no medication that we can tell . . . . He's fully conscious. He's alert. And even though he requests the pain medication. . . , there wasn't anything I saw on the DVD or any testimony . . . that would indicate to me that he was debilitated or otherwise in such pain that his free will was overcome by his physical condition. [¶] And finally, on the issue of his age, notwithstanding the officer's belief, and rightfully so, that he was over the age of 18, the Court still . . . has considered his actual true age and his intelligence and his capacity to understand as demonstrated both in the DVD as well as the transcript and through the testimony of the officers that there wasn't anything about his age or his request for his father that in this Court's view overcomes his free will in executing an implied waiver." [2]

On appeal, we defer to the trial court's factual findings which are supported by substantial evidence and independently determine whether the statement was obtained in violation of *Miranda*. (*People v. Nelson* (2012) 53 Cal.4th 367, 380 (*Nelson*).) '"[A] suspect who desires to waive his *Miranda* rights and submit to interrogation by law enforcement authorities need not do so with any particular words or phrases. A valid waiver need not be of predetermined form, but instead must reflect that the suspect in fact

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[2] Appellant was 17 years old (date of birth February 2, 1991) when interviewed. The officers, however, found a resident alien card listing appellant's date of birth as February 2, 1989 and believed appellant was an adult. Appellant said he was 19 years old at the hospital and when he was booked.

knowingly and voluntarily waived the rights delineated in the *Miranda* decision. [Citation.] We have recognized that a valid waiver of *Miranda* rights may be express or implied. [Citations.] A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. [Citations.]'" (*People v. Hawthorne* (2009) 46 Cal.4th 67, 86.)

After appellant was released from the hospital, he was advised of his *Miranda* rights in the Spanish language. Officer Purcell read from a *Miranda* card and, after each advisement, looked at appellant and asked if he understood. Appellant nodded his head up and down in the affirmative, indicating that he understood each right.

Officer Purcell asked how appellant cut his hand. Appellant said, "I don't feel good right now" and asked for a five-minute break. Officer Purcell and his partner, Detective Jay Carrott, honored appellant's request and stopped the questioning.

Appellant broke the silence a minute later and asked for a pill. Officer Purcell explained that the police were not authorized to administer medication and confirmed that the hospital had not prescribed any medication when it released appellant.[3] Appellant said that his hand was "stinging" but agreed to proceed with the interview.

Appellant contends that he had just been released from the hospital, was in pain, and was unable to waive his *Miranda* rights. The DVD shows to the contrary. Appellant wanted to speak to the officers and used his bandaged hand to open a water

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[3] Appellant complains that the officers did not give him a full five-minute break. Appellant confuses *Miranda* waiver with the invocation of a defendant's right to remain silent. " 'Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.' [Citation.]" (*People v. Martinez* (2010) 47 Cal.4th 911, 951.) Appellant waived his *Miranda* rights and asked for a break. A minute later he asked for a pill and said, "Where is my father, is he here?" Appellant did not invoke his right to remain silent nor was Officer Purcell under any obligation to cease questioning. (*Ibid.*; see *Berghuis v. Thompkins* (2010) 560 U.S. at p. ___ [176 L.Ed.2d at p. 1115].)

bottle, point to a diagram, rub his face, and make stabbing gestures. Appellant demonstrated what took place between Josefina and him by standing up and identifying their body positions. At another point in the interview, he stepped over to a doorway in the interrogation room and identified the bloody pants and socks found in his bedroom closet. Following the interview, appellant agreed to accompany the officers to the house and do a crime scene walk-through which was videotaped. As appellant walked through the bloodstained bedroom, he was calm, paused at the bathroom door, and asked Officer Purcell if his socks would get stained by the blood.

The DVD depicts an alert young man who is sober, calm, and is responsive to the officers' questions. There is no evidence that the hand injury clouded appellant's judgment or impaired his decision to waive his rights. (See, e.g., *People v. Breaux* (1991) 1 Cal.4th 281, 299-301 [*Miranda* rights waived in hospital directly following emergency treatment for gunshot wounds and injection of morphine to relieve pain]; *People v. Perdomo* (2007) 147 Cal.App.4th 605, 616-617 [defendant waived *Miranda* rights while in intensive care and medicated for pain].) Unlike the defendant in *Mincey v. Arizona* (1978) 437 U.S. 385, 398-401 [57 L.Ed.2d. 290, 304-305] who suffered unbearable pain and lost consciousness during the police interview, appellant was lucid, asked questions, and interacted with the officers.

Appellant complains that he was not provided a written copy of the *Miranda* warnings but a verbal admonition is sufficient. Officer Purcell read from a *Miranda* warning advisement card and asked whether appellant understood each right. Appellant nodded his head up and down in the affirmative, looked Officer Purcell in the eye, and by his gestures and conduct indicated that he was waiving his rights and wanted to talk to the officers.

He also complains that Officer Purcell failed to obtain an express verbal or written waiver of each *Miranda* right. As discussed in *Berghuis v. Thompkins supra*, 560 U.S. at p. __ [176 L.Ed.2d at p. 1112], the waiver may be implied. A defendant, by his words and conduct, may make an implied waiver of his *Miranda* rights by

acknowledging that he understands the rights read and answering questions. (*People v. Whitson* (1998) 17 Cal.4th 229, 250.)

Appellant contends that he invoked his right to counsel/remain silent when he asked about his father. Appellant said, "I wish my Dad could be here with me," and "Where is my father?" but did not ask the officers to stop the interview. The trial court found that "never in conjunction with discussing his father did [appellant] actually ask to terminate [the interview] and talk to his father. In effect, he doesn't ask to talk to his father. He makes statements such as, 'I wish he were here' or 'where's my father?'"

In *People v. Lessie* (2010) 47 Cal.4th 1152, our Supreme Court held that a minor's request "to make a phone call to my dad" (*id*., at p. 1159) did not render his statements inadmissible (*id*., at pp. 1169-1170). "Defendant's confession would be subject to exclusion under the federal Constitution if the totality of the relevant circumstances demonstrated that his purpose in asking to speak with his father was to invoke his Fifth Amendment privilege. (See, e.g., *Fare* [*v. Michael C.* (1979)] 442 U.S. 707, 725. . .) . . . Defendant did not say, for example, that he wanted to speak with his father before answering questions or wanted his father to call an attorney on his behalf. Nor did defendant hesitate at any point to answer the detectives' questions." (*Id*., at p. 1170.)

The same analysis applies here. Appellant did not say that he wanted to stop the interview, wanted his father to be present, or wanted his father to call an attorney. There is no evidence that the officers misled appellant or that appellant wanted to stop the interview.[4] "'. . . 'Faced with an ambiguous or equivocal statement, law

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[4] Midway through the interview, appellant was shown a pair of bloody pants found in his closet. Appellant asked, "[D]oes my father know that we are here?" Officer Purcell responded, "Oh, I don't know. The truth is I don't know."

Appellant continued answering questions and said, "I would like to see my dad," and that his father was working at "Marie Calendar's." Officer Purcell replied, "Okay. We can communicate to him, we can get in touch with your dad, but before doing this, we want to understand like how this happened. So that we can also explain it to your dad. Because your dad is going to have a difficult time understanding this. *Okay*?"

enforcement officers are not required . . . either to ask clarifying questions or to cease questioning altogether." [Citations.]' [Citations.]" (*People v. Scott* (2011) 52 Cal.4th 452, 481.)

In *People v. Nelson*, *supra*, 53 Cal.4th 367, a 15-year-old charged with murder and burglary waived his *Miranda* rights and asked to speak to his mother. Relying on *Davis v. United States* (1994) 512 U.S. 452, our Supreme Court held that the defendant's request to speak to his mother was not sufficiently clear to require cessation of the interrogation. (*Nelson, supra,* at p. 372.) Consistent with *Davis v. California*¸ *supra,* the court held that once a juvenile suspect has waved his or her *Miranda* rights, "any subsequent assertion of the right to counsel must be articulated 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. [Citation.] This standard likewise applies to assertions of the right to remain silent. [Citation.]" (*Nelson, supra,* 53 Cal.4th at pp. 371-372.)

The court in *Nelson* explained: "There are important practical and policy reasons supporting this rule. When the interrogating officers 'reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity," . . . because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.' [Citation.] Likewise, in the right to silence context, '[i]f an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong."' [Citation.] In such circumstances, suppression of a voluntary confession 'would place a significant burden on society's interest in prosecuting criminal activity.' [Citation.]" (*Nelson, supra,* 53 Cal.4th at pp. 377-378.)

The trial court considered appellant's age, experience, education, background, and intelligence, and whether appellant had the capacity to understand the *Miranda* warnings and the consequences of waiving those rights. (*Fare v. Michael C.*,

supra, 442 U.S. at pp. 724-725 [61 L.Ed.2d at p. 212]; *People v. Lessie*, *supra*, 47 Cal.4th at p. 1169.) We have reviewed the DVD and transcript of the interview and, like the trial court, conclude that appellant freely and voluntarily waived his *Miranda* rights.

Appellant argues that the suspect's age is an important factor in determining whether he voluntarily waived his *Miranda* rights. It is settled that a minor has the capacity to waive his *Miranda* rights and make a voluntary confession. (*People v. Lessie*, *supra*, 47 Cal.4th at pp. 1166-1167.) Appellant was 17 years old but said he was 19. (*Ante*, fn 2.) The officers believed him, and for good reason. Appellant looks and acts like an adult on the DVD.

The record is devoid of evidence that appellant, because of his age, education, intelligence, or medical condition did not understand the rights he was waiving or what the consequences would be if he talked to the officers. (See *Fare v. Michael C.*, *supra*, 422 U.S. at pp. 726-727 [61 L.Ed.2d at pp. 213-214]; *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 579.) Based on the totality of the circumstances, it is clear that appellant knowingly and voluntarily waived his *Miranda* rights. (*People v. Lewis* (2001) 26 Cal.4th 334, 383-384; see, e.g., *United States v. Doe* (9th Cir 1995) 60 F.3d 544, 546 [officer's unrebutted testimony established that juvenile knowingly and voluntarily waived his *Miranda* rights].)

Harmless Error

Assuming, arguendo, that appellant's statement should have been excluded, any error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [113 L.Ed.2d 302, 332]; *People v. Cunningham* (2001) 25 Cal.4th 926, 994.) Appellant's statement to the police did not explicitly admit guilt, and confirmed what was already established by the physical evidence. "Without defendant's statements, the physical evidence still established defendant's guilt as to all the crimes charged and the special circumstances alleged." (*People v. Davis* (2009) 46 Cal.4th 539, 599.)

Abraham Gutierrez and Luis Mendoza saw appellant's cut hand and blood outside Josefina's bedroom door. Blood was in appellant's car and on his dress shirt in the car. Appellant left Josefina nude on the bedroom floor with her legs spread apart and

a knife protruding from her back. Josefina was covered with bruises and stab wounds, many of which were inflicted after appellant removed her nightgown and bra.

Appellant asserts that there was no sperm or trauma to the victim's vagina to support the finding that he murdered Josefina during the commission of a rape or attempted rape. The coroner, however, testified that only 30 percent of adult sexual assault victims have visible injuries to their genitalia. The absence of trauma or injury to Josefina's vagina did not rule out rape or attempted rape. (See, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1130-1132 [physical evidence of a sexual assault is not a prerequisite to finding intent to rape].) Nor does attempted rape require sexual penetration. (*People v. Scott, supra,* 52 Cal.4th at p. 488.)

The trial court found that the violence inflicted "is really inexplicable. And there isn't, other than the rape special circumstance, there isn't any rationale explanation as to how [appellant] could have found himself in this position." We concur. The assailant had no reason to disrobe Josefina, drag her from the bathroom to the bedroom, or touch her inner thighs unless it was for a sexual purpose. It was uncontroverted that the knife wounds were inflicted before and after the nightgown was removed and that Josefina suffered defensive wounds trying to protect herself. Blood was under appellant's penis foreskin and Josefina's DNA was on appellant's scrotum. Blood, long hairs, and fibers were on appellant's feet and between his toes, and dried blood was on his legs, hands, head, bracelet, and ears.

Appellant's palm print was on the bathroom floor and his sock imprint was on the bathroom door, consistent with the prosecution's theory that appellant straddled Josefina and dragged her out of the bathroom as she kicked the floor. Josefina's nightgown and bra were in the bathroom and her panties were in the bedroom. Appellant's DNA was on Josefina's perianal area and thighs, and on the bathroom wall next to the light switch. Forensic evidence showed that appellant spread Josefina's legs, leaving bloody handprints and friction ridges on her inner thighs. A blood spatter expert testified that the wide blood swipe on Josefina's upper buttocks and back was consistent with an erect male penis.

Appellant's statements to the police were not essential to the People's case. His statements were overshadowed by grisly physical and forensic evidence that he murdered Josefina during a violent sexual assault. Any error in admitting appellant's police station statement was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23-24 [17 L.Ed.2d 705, 710-711]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1314.)

Life Without Possibility of Parole

Appellant argues that his LWOP sentence violates the Eighth Amendment and is cruel and unusual punishment. Appellant, however, failed to object to the sentence, forfeiting his right to challenge the sentence as cruel and unusual punishment. (*People v. Russell* (2010) 187 Cal.App.4th 981, 993; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.)

On the merits, appellant makes no showing that the sentence is grossly disproportionate to the severity of the crime. (*Solem v. Helm* (1983) 463 U.S. 277, 288 [77 L.Ed.2d 637, 647-648] (*Solem*); *People v. Dillon* (1983) 34 Cal.3d 441, 477-478.) In evaluating proportionality, courts consider (1) the nature of the offense and the offender, (2) punishments for more serious offenses in the same jurisdiction, and (3) punishments for the same crime in other jurisdictions. (*Solem*, *supra*, at pp. 290-292 [77 L.Ed.2d at pp. 649-650]; *In re Lynch* (1972) 8 Cal.3d 410, 425-427.) "[A]pplication of a proportionality analysis to reduce a first degree felony-murder conviction must be viewed as representing an exception rather than a general rule." (*People v. Munoz* (1984) 157 Cal.App.3d 999, 1014.) Murder is a violent and serious crime and presents the highest level of danger to society. (*People v. Em* (2009) 171 Cal.App.4th 964, 972-973.)

Here the murder was extremely brutal. Appellant repeatedly stabbed Josefina in the course of a violent sexual assault. He expressed no remorse and told the police (three days after the murder) that Josefina sexually assaulted him. After the interview, he accompanied the officers to the house and calmly walked through the bloodstained bedroom.

Nor has appellant shown that the LWOP sentence is so grossly disproportionate to the crime "'. . . that it shocks the conscience and offends fundamental notions of human dignity,' thereby violating the prohibition against cruel and unusual punishment of the Eighth Amendment of the federal Constitution or against cruel or unusual punishment of article I, section 17 of the California Constitution [Citations.]" (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1042.) Under the Eighth Amendment, a life sentence consistent with state law is unconstitutional only in that "'rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross, disproportionality.' [Citation.]" (*Ewing v. California* (2003) 538 U.S. 11, 30 [155 L.Ed.2d 108, 123].) That is not the case here.

Roper/Graham

Citing *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1] (*Roper*), and *Graham v. Florida* (2010) __ U.S. ___ [176 L.Ed.2d 825] (*Graham*), appellant argues that juvenile offenders are less culpable than adults who commit violent crimes because juvenile offenders lack maturity, perspective, judgment and self-discipline. The holding of *Roper* is that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." (*Roper*, *supra*, at p. 578 [161 L.Ed.2d at p. 28].) The decision in *Graham* is that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." (*Graham*, *supra*, at p. __ [176 L.Ed.2d at p. 850].) *Roper* and *Graham* do not prohibit imposition of a life sentence where the juvenile commits a homicide. (See, e.g., *Harris v. Wright* (9th Cir. 1996) 93 F.3d 581, 583-585 [concluding that LWOP sentence not unconstitutionally disproportionate to 15-year-old defendant convicted of murder].)

Appellant has not demonstrated that his punishment is grossly disproportionate to punishments for more serious offenses in California or punishments for similar offenses in other jurisdictions. (*In re Lynch*, *supra*, 8 Cal.3d at pp. 425-427; *Solem*, *supra*, 4363 U.S. at pp. 291-292 [77 L.Ed.2d at pp. 649-650].) Only six states forbid LWOP sentences for juvenile offenders and seven states permit LWOP sentences

for juvenile offenders. (*Graham, supra*, __ U.S. at p. __, appens. II & III [176 L.Ed.2d at p. 852, appens. II & III].) Courts in this state and other states have held that a LWOP sentence does not constitute cruel and/or unusual punishment where the juvenile offender is convicted of felony murder. (See *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1147; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 17 [50 years to life not cruel and unusual punishment for 14-year-old convicted of aiding and abetting gang-related murder]; *People v. Launsburry* (Mich 1996) 551 N.W.2d 460, 463-464; *Commonwealth of Pa. v. Carter* (Pa. Super. 2004) 855 A.2d 885, 891-892.)

In *People v. Caballero* (2012) 55 Cal.4th 262 our Supreme Court recently held that a 110-year-to-life sentence imposed on a juvenile convicted of nonhomicide offenses (three gang-related attempted murders) was the functional equivalent of a life sentence without the possibility of parole and contravenes *Graham. Caballero* is inapposite because appellant was convicted of a special circumstances felony murder and sentenced pursuant to section 190.5, subdivision (b) which vested the tiral court with the discretion to impose a 25-yer-to-life sentence.

Miller

The United States Supreme Court, in *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455] (*Miller*), recently held that mandatory LWOP sentences for juvenile homicide offenders violate the Eighth Amendment's prohibition on cruel and unusual punishment. In *Miller* (14-year-old convicted of arson-murder) and a companion case (*Jackson v. Hobbs* [14-year-old convicted of felony-murder]), state law mandated a LWOP sentence even if the sentencing court believed that a lesser sentence was more appropriate. (*Id*., at p. ___ [132 S.Ct. at p. 2460.) The *Miller* court stated that "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth

Amendment's ban on cruel and unusual punishment." (*Id.*, at p. __ [132 S.Ct. at p. 2475].)

Unlike *Miller*, appellant's LWOP sentence was not mandatory. Appellant was sentenced pursuant to section 190.5, subdivision (b) which provides that a juvenile defendant 16 years of age or older who is convicted of first degree, special circumstance murder *may be* sentenced to life without possibility of parole.[5] (*People v. Guinn*, *supra*, 28 Cal.App.4th at pp. 1141-1142.) The statute does not require a mandatory LWOP sentence and vests sentencing courts with the discretion to sentence the defendant to a term of 25 years to life with possibility of parole. It does not violate the proscription against cruel or unusual punishment. (*Id.*, at p. 1143-1144.)

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

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[5] Section 190.5, subdivision (b) states: "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 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*." (Italics added.)

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."

Section 190.5, subdivision (b) "requires 'a proper exercise of discretion in choosing whether to grant leniency and impose the lesser penalty of 25 years to life for 16-year-old or 17-year-old special circumstance murderers. The choice whether to grant leniency of necessity involves an assessment of what, in logic, would mitigate or not mitigate the crime. . . .'" (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089.)

The trial court was aware of its discretion and declined to impose a more lenient sentence. Remanding for resentencing in light of *Miller* would be a futile exercise. Appellant argues that a categorical ban of LWOP sentences for juveniles is required under the Eighth Amendment, but no court has so held.

Appellant's remaining arguments have been considered and merit no further discussion.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Patricia M. Murphy, Judge

Superior Court County of Ventura

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