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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ANDREW LAWRENCE MOFFETT,

Defendant and Appellant.

First Appellate District, Division Five, Case No. A133032
Contra Costa County Superior Court, Case No. 051378-8
The Honorable Laurel Brady, Judge

APPLICATION FOR PERMISSION TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF JO ANN LASATER, PHYLLIS LOYA, AND JAMES LASATER IN SUPPORT OF RESPONDENT

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APPLICATION FOR PERMISSION TO FILE BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENT

To the Honorable Chief Justice of the Supreme Court of the State of California

Jo Ann Lasater, Phyllis Loya, and James Lasater respectfully apply for permission to file a brief amici curiae in support of Respondent, the People of the State of California, pursuant to rule 8.520(f) of the California Rules of Court.

Applicant's Interest

Jo Ann Lasater, Phyllis Loya, and James Lasater are the wife, mother, and brother of Officer Larry Lasater. At the time of his murder, the victim was excitedly awaiting the birth of his first child. Officer Lasater's family was devastated by his murder and have expressed how their lives have been

forever altered by the crime of Alexander Hamilton and Andrew Moffett. Each rehearing has taken a toll on them emotionally and physically as each appellate review forces them to relive the horror of their loved one's murder.

Need for Further Argument

Amici are familiar with the arguments presented on both sides of this issue and believe that further argument is necessary.

The brief is submitted with this application and ready for immediate filing. The attached brief brings to the attention of the court additional United States Supreme Court precedents, not previously briefed, regarding when a sentencing statute is deemed "mandatory" for the purpose of the Eighth Amendment. It also brings to the attention of the court important considerations of the impact of parole on victims.

July 22, 2013

Respectfully Submitted,

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BRIEF AMICI CURIAE OF
JO ANN LASATER, PHYLLIS LOYA, AND JAMES LASATER
IN SUPPORT OF RESPONDENT

SUMMARY OF FACTS AND CASE

This case arises from a crime committed by two young *men*[1] on April 23, 2005. Andrew Moffett, defendant in the present appeal, was just four days short of his 18th birthday, on which he would be considered legally an adult for most purposes. (See Respondent's Brief 9.) His accomplice Alexander Hamilton was only slightly older at 18.

Moffett and Hamilton robbed a Raley's supermarket in Pittsburg and a Wells Fargo Bank branch located within the supermarket. (See *People v. Moffett* (2012) 209 Cal.App.4th 1465, 1468.) Moffett was a full partner in the robbery, not a minor accomplice. He put a gun to an employee's head, demanded money, and berated her for taking too long. (See *ibid*.)

1. See Part IV, *infra*, at pp. 14-15.

During their escape, Moffett threatened another citizen with death. (See *id*., at p. 1469.)

Pittsburg police officers responded to the call. Hamilton shot and killed Officer Larry Lasater. (See *Moffett*, *supra*, 209 Cal.App.4th at p. 1469.) Both defendants were convicted of first-degree murder with special circumstances and related charges. For the murder, Moffett was sentenced to life without parole, and Hamilton was sentenced to death. (See *id*. at p. 1471.)

Following an appeal, the case was remanded for resentencing. The trial judge was aware she had discretion under Penal Code section 190.5 to choose between sentences of life imprisonment with or without the possibility of parole. (See *Moffett*, *supra*, 209 Cal.App.4th at p. 1472.) The judge noted Moffett's youth but also noted he was only slightly short of the age of majority, mistakenly saying a few months instead of a few days. (See *ibid*.) She also noted the impact of the crime on the victims and Moffett's major role in the crime. (See *id*. at pp. 1472-1473.)

> "The actions taken by Mr. Moffett on the day of this event were not those of an irresponsible child. They were the very adult, very violent acts of a young man who showed no regard for the impact of his actions on the victim in this case. I might add that his actions on that day also have had a profound effect and directly affected his own family and loved ones. Although Mr. Moffett was slightly under eighteen years old at the time, his actions on that day, coupled with his criminal history, do not support, in my opinion, this Court exercising [its] discretion and sentencing him to a determinate [*sic*] term of twenty-five years to life. *I do not find that sentence appropriate in this particular case under the circumstances of this case, taking into account everything that is in front of me*." (*Id*. at pp. 1473-1474, italics added.)

The Court of Appeal reversed on the theory that a presumption in favor of life without parole in the case law under Penal Code section 190.5 is inconsistent with the recent decision of the United States Supreme Court

in *Miller v. Alabama* (2012) 132 S.Ct. 2455, 183 L.Ed.2d 407. This court granted review.

SUMMARY OF ARGUMENT

The possibility of parole for a murderer means a life sentence for the victim's family. When release amounts to a miscarriage of justice, the family must repeatedly oppose release, reliving the horror and reopening the wounds. The sentence of life without parole exists in our law for good reasons, and finality for the family is one of them.

Although the exact reach of the United States Supreme Court's decision in *Miller v. Alabama* is not yet clear, nothing in that decision implies that constitutional restrictions on life-without-parole sentences for 17-year-old murderers are any more severe than the restrictions on death sentences for 18-year-old murderers, and such a result would be absurd. Applying the capital case precedents of *Blystone v. Pennsylvania* and *Boyde v. California* resolves the central question in this case. The statute before the court remains a discretionary one for the purpose of the jurisprudence of the Eighth Amendment, even if it has some "mandatory features."

The trial court was entirely correct to take into account Moffett's actions during the robbery and the impact of those actions on the robbery victim. *Miller* did not throw out all the progress that has been made in victims' rights. It did not overrule *Payne v. Tennessee*, finding victim impact proper to consider in sentencing.

The degree of a nontriggerman's participation in the underlying felony has been considered important throughout the United States Supreme Court's capital felony murder cases, and it was properly considered here. Had Moffett been just a few days older on the day of the crime, he would have been eligible for the death penalty under *Tison v. Arizona* and under California law. Defendant's contention that he is categorically exempt

from the punishment of life without parole when he is actually very close to eligibility for the death penalty is meritless.

Notwithstanding the unfortunate choice of words in the *Miller* opinion, 16- and 17-year-old murderers should not be referred to as "children." That usage is incorrect, misleading, and profoundly offensive to persons who have suffered violence at the hands of teenage thugs. This court should continue referring to them as "juveniles."

ARGUMENT

I. Possibility of parole is a life sentence for the victim's family.

Opponents of capital punishment regularly claim that it is not needed because life without parole provides victims' families with the finality they need. The proponents of Proposition 34 on last year's ballot promised that repeal of the death penalty would "[k]eep heinous killers IN PRISON UNTIL THEY DIE with NO HOPE OF EVER GETTING OUT." (Ballot Pamp., Gen. Elec. (Nov. 6, 2012), rebuttal to argument against Prop. 34, p. 41.) Although Californians rejected the argument for killers over the age of 18, they long ago accepted that those under 18 at the time of the crime would not be executed, with the important provision that life without parole would be available for the worst cases.

Penal Code section 190.5 was amended to its present form by the people in Proposition 115 of 1990. Among the goals of that initiative were "to create a system in which violent criminals receive just punishment [and] in which crime victims and witnesses are treated with care and respect . . . ." (Stats. 1990, p. A-243, § 1, subd. (c).)

The possibility of parole, in a case where it is not warranted, operates contrary to both interests. For the perpetrator of an especially heinous murder to walk free, perhaps while he still has half a lifetime ahead of him, is such a grievous miscarriage of justice that the victim's family often feels

compelled to fight against it, bringing the pain back to the surface and reliving the horror each time the murderer comes up for parole. In the findings section of Proposition 9 of 2008, the experience of the families in such cases is described (Stats. 2008, pp. A-299, A-300):

> 5. Each year hundreds of convicted murderers sentenced to serve life in prison seek release on parole from our state prisons. California's "release from prison parole procedures" torture the families of murdered victims and waste millions of dollars each year. In California convicted murderers are appointed attorneys paid by the tax dollars of its citizens, and these convicted murderers are often given parole hearings every year. The families of murdered victims are never able to escape the seemingly unending torture and fear that the murderer of their loved one will be once again free to murder.
>
> 6. "Helter Skelter" inmates Bruce Davis and Leslie Van Houghton, two followers of Charles Manson convicted of multiple brutal murders, have had 38 parole hearings during the past 30 years.
>
> 7. Like most victims of murder, Marsy was neither rich nor famous when she was murdered by a former boyfriend who lured her from her parents' home by threatening to kill himself. Instead he used a shotgun to brutally end her life when she entered his home in an effort to stop him from killing himself. Following her murderer's arrest, Marsy's mother was shocked to meet him at a local supermarket, learning that he had been released on bail without any notice to Marsy's family and without any opportunity for her family to state their opposition to his release.
>
> 8. Several years after his conviction and sentence to "life in prison," the parole hearings for his release began. In the first parole hearing, Marsy's mother suffered a heart attack fighting against his release. Since then Marsy's family has endured the trauma of frequent parole hearings and constant anxiety that Marsy's killer would be released.
>
> 9. The experiences of Marsy's family are not unique. Thousands of other crime victims have shared the experiences of Marsy's family, caused by the failure of our criminal justice system to notify them of their rights, failure to give them notice of important hearings in the prosecutions of their criminal wrongdoers, failure to provide them

> with an opportunity to speak and participate, failure to impose actual and just punishment upon their wrongdoers, and failure to extend to them some measure of finality to the trauma inflicted upon them by their wrongdoers.

While the reforms enacted in Marsy's Law will provide some relief if enforced, the possibility of parole will always remain a threat so long as it exists. The people had good reasons to set the punishment for first-degree murder with special circumstances by 16- and 17-year-olds at life without parole (LWOP), with discretion to substitute life with parole. The law enacted by the people should not be brushed aside lightly, but only if the Constitution actually requires that result. As we will show in the next part, it does not.

II. A discretionary sentencing system does not become a "mandatory" one, within the meaning of the U.S. Supreme Court's Eighth Amendment jurisprudence, merely because it has "some mandatory features."

In *Miller v. Alabama* (2012) 132 S.Ct. 2455, 2460, 183 L.Ed.2d 407, 414-415, the United States Supreme Court held "that *mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " (Italics added.) That holding is the same as the rule that the court applied to capital sentencing in *Woodson v. North Carolina* (1976) 428 U.S. 280. (See *Miller*, *supra*, 132 S.Ct., at p. 2467, 183 L.Ed.2d, at p. 421.) The *Miller* majority also relies (see *ibid*.) on the post-*Woodson* line of individualized sentencing cases beginning with *Lockett v. Ohio* (1978) 438 U.S. 586 (plur. opn.), but it does not go so far as to import wholesale into the law of juvenile LWOP the entire Byzantine apparatus that it has created for capital sentencing. There is good reason why the high court should not do so in the future. The *Lockett* line has caused enormous confusion, delay, waste, and the unjust overturning of valid sentences. The high court was, for many years, unable to agree with itself from one year

to the next what the Constitution forbids and what it requires. (See *Lockett*, *supra*, at p. 622 (conc. and dis. opn. of White, J.) ("completed its about-face since *Furman*"); *Graham v. Collins* (1993) 506 U.S. 461, 496-497 (conc. opn. of Thomas, J.).) While the United States Supreme Court has noted, correctly, that the Eighth Amendment does not authorize federal courts to micromanage state capital sentencing procedure (see *Harris v. Alabama* (1995) 513 U.S. 504, 512), it has often done exactly that. (See, *e.g.*, *Shafer v. South Carolina* (2001) 532 U.S. 36, 58 (dis. opn. of Thomas, J.).)

Even so, until such time as the high court clarifies how much of the *Lockett* line will be imported to juvenile LWOP sentencing, we can regard that line of cases as an upper limit. It would be absurd to say that a given procedure is constitutionally sufficient for sentencing an 18-year-old to death yet unconstitutional for sentencing a 17-year-old to life without parole. Death is still different, and the difference between death and LWOP remains larger by far than the difference between 17- and 18-year-olds. The *Miller* majority opinion said "children[2] are different too" (132 S.Ct., at p. 2470, 183 L.Ed.2d, at p. 425), but it did not claim that the difference was greater than the death/LWOP difference, and any such claim would not be credible. (See, *e.g.*, *Woodson*, *supra*, 428 U.S., at p. 305 (lead opn.).)

In the present case, the Court of Appeal looked solely at dicta in the *Miller* opinion, made no examination whatever of the individualized sentencing cases that *Miller* relies on, and concluded that the presumptive nature of section 190.5, subdivision (b) "is contrary to the spirit, if not the letter, of *Miller*." (*People v. Moffett* (2012) 209 Cal.App.4th 1465, 1476.) The United States Supreme Court has reminded us, and itself, more than once that "[i]t is to the holdings of our cases, rather than their dicta, that we

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2. See Part IV, *infra*, at pp. 14-15.

must attend." (*Bennis v. Michigan* (1996) 516 U.S. 442, 450, quoting *Kokkonen v. Guardian Life Ins. Co. of America* (1994) 511 U.S. 375, 379.)

Defendant cites various authorities for the proposition that "Supreme Court dictum [is] entitled to considerable deference . . . ." (Answer Brief 28, fn. 7.) That is true enough as far as it goes, but between dicta entitled to deference and holdings entitled to obedience, holdings prevail. On the question of whether a system of sentencing that permits exercise of discretion but has some mandatory aspects falls on the discretionary or mandatory side of the *Lockett* line, we do not need to rely on expansive dicta or perceived "spirit." We have holdings.

In Pennsylvania, the death penalty statute provides, "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases." (42 Pa. Cons. Stat., § 9711, subd. (c)(1)(iv).) In *Commonwealth v. Peterkin* (1986) 511 Pa. 299 [513 A.2d 373, 387-388], the Pennsylvania Supreme Court upheld the statute as written, rejecting the claim that "the statute creates a conclusive presumption favoring imposition of the death penalty . . . ." The mandatory aspect of the statute came into sharp focus in *Commonwealth v. Blystone* (1988) 519 Pa. 450 [549 A.2d 81, 93], when the defendant "refused to present any evidence of mitigation . . . ." The court rejected the claim statute's "mandatory language" made it unconstitutional, relying on *Peterkin*. (See 549 A.2d. at p. 92.)

The United States Supreme Court granted certiorari and affirmed. (*Blystone v. Pennsylvania* (1990) 494 U.S. 299.) The dissenting justices agreed with the defendant that the challenged provision was a "mandatory provision." (See *id*. at p. 311 (dis. opn. of Brennan, J.).) The finding of an aggravating circumstance requires a death sentence unless the defendant

comes forward with mitigating circumstances sufficient to outweigh it. (See *ibid*.) The dissent does not use the word "presumption," but that is what a presumption does. At a minimum, it shifts the burden of producing evidence. (1 Witkin, Cal. Evidence (5th ed. 2012) Burden of Proof and Presumptions, § 59, p. 233.)

The opinion of the court did not dispute the dissent's characterization. (See *Blystone*, *supra*, 494 U.S. at p. 313 (dis. opn. of Brennan, J.).) The court affirmed based on precedents upholding capital sentencing statutes with "some 'mandatory' aspects." (See *id*. at p. 303.) The statute allowed the sentencer to take mitigating circumstances into account, and it did not automatically impose death upon conviction of a particular crime. "This is sufficient under *Lockett* and *Penry*." (*Id*. at p. 305, footnote omitted.) The fact that a death sentence would be required if the defendant did not come forward with a reason not to impose it (*i.e.*, was presumptive) did not render it unconstitutional.

In California, this court took a different tack. The 1978 death penalty law provides that the "trier of fact . . . shall impose a sentence of death if . . . the aggravating circumstances outweigh the mitigating circumstances," (Pen. Code, § 190.3), essentially the same as the Pennsylvania statute. Five years before *Blystone v. Pennsylvania*, a majority of this court accepted the argument that the statute would be unconstitutional if literally applied and interpreted it to allow the jury to decide the sentence on its determination of what is appropriate. (See *People v. Brown* (1985) 40 Cal.3d 512, 540-541.)[3] In *People v. Boyde* (1988) 46 Cal.3d 212, 252-255, this court reaffirmed the *Brown* interpretation of the statute, although it was narrowly divided on whether the jury had been correctly instructed on that interpretation. (See *id*. at p. 257 (dis. opn. of Arguelles, J.).)

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3. Justice Lucas correctly anticipated *Blystone*'s rejection of this argument. (See *id*. at p. 546 (conc. opn.).)

The United States Supreme Court granted certiorari and decided the case a week after *Blystone*. (See *Boyde v. California* (1990) 494 U.S. 370.) It did not need to resolve the question that had divided this court, because the statute presents no federal constitutional problem even under the literal interpretation. "In *Blystone*, we rejected a challenge to an instruction with similar mandatory language, holding that '[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence.' " (*Id*. at p. 377, quoting *Blystone*.) "Petitioner's claim that the 'shall impose' language of CALJIC 8.84.2[4] unconstitutionally prevents 'individualized assessment' by the jury is thus without merit." (*Ibid*.)

Blystone and *Boyde* resolve the principal issue presented in this case. A statute that makes the higher sentence presumptive upon the finding of special circumstances is not impermissibly mandatory within the meaning of the Supreme Court's Eighth Amendment jurisprudence so long as the sentencer has discretion to consider the defendant's proffered mitigation.

III. The trial court's consideration of victim impact evidence was entirely proper, and the proportionality of the sentence is well within constitutional limits.

In a passage that is nothing short of astonishing, the Court of Appeal actually chastised the trial court for considering the impact of the crime on the robbery victims.

> "We also note that the trial court placed great reliance on the trauma caused to the robbery victims in this case when determining the appropriate sentence for the murder count. Though appellant's conduct during the robbery bears on whether he was an active participant in and instigator of the criminal conduct that led to the shooting (which in turn bears on whether he was influenced by others), the psychological reactions of the robbery victims do not say

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4. Fourth edition, 1979, pre-*Brown*.

> much about appellant's maturity, prospects for reform, or mental state with respect to the homicide itself—the factors paramount under *Miller*. (*Miller*, *supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2468].)" (*People v. Moffett* (2012) 209 Cal.App.4th 1465, 1477.)

This passage should be expressly disapproved. There was a four-year interval when the United States Supreme Court forbade victim impact evidence in the penalty phase of capital cases under *Booth v. Maryland* (1987) 482 U.S. 496, even while the defendant was constitutionally entitled to put forth any mitigation evidence he wanted, no matter how weak it was or how little connection to the crime it had. Victims of crime had to sit muzzled in the spectator section of the courtroom. The murder victim was treated as nothing but an abstraction while a long train of witnesses sought to humanize the murderer with real or fabricated testimony in mitigation.

Fortunately, the high court soon recognized what a monstrous injustice it had created. The Supreme Court of Tennessee, faced with a *Booth* challenge, said, "It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims." (*State v. Payne* (Tenn. 1990) 791 S.W.2d 10, 19.) The high court quoted that passage and overruled *Booth*. (*Payne v. Tennessee* (1991) 501 U.S. 808, 826, 830.)

In a felony-murder case, consideration of the defendant's conduct and culpability in the underlying felony is not only constitutionally permissible, it is constitutionally required. Throughout the capital felony-murder cases involving nontriggermen we see constant reference to the defendant's degree of participation. In *Lockett v. Ohio* (1978) 438 U.S. 586, 589-591, the case that created the "anything goes in mitigation" rule, the plurality opinion described the crime in some detail. Lockett never entered the store, did not hurt or personally threaten anyone, and did not intend that

anyone be hurt. The plurality noted "her relatively minor part in the crime." (*Id*. at p. 597.) In *Enmund v. Florida* (1982) 458 U.S. 782, the case that exempted minor accomplices in felony-murder cases from capital punishment, the high court again recited the facts of the crime, noting the Florida Supreme Court's holding that "that the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape." (*Id*. at p. 788.) In *Tison v. Arizona* (1987) 481 U.S. 137, 158, by contrast, the high court emphasized the defendants' extensive involvement in the crimes leading up the killing, even though they did not kill or intend to kill:

> "The petitioners' own personal involvement in the crimes was not minor, but rather, as specifically found by the trial court, 'substantial.' Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each petitioner was actively involved in every element of the kidnaping-robbery and was physically present during the entire sequence of criminal activity culminating in the murder of the Lyons family and the subsequent flight. The Tisons' high level of participation in these crimes further implicates them in the resulting deaths. Accordingly, they fall well within the overlapping second intermediate position which focuses on the defendant's degree of participation in the felony."

Yet the Court of Appeal in the present case believes that one passage of *Miller* wipes all of this out. The defendant's act of personally threatening a person at gunpoint with immediate death and thereby causing permanent and entirely foreseeable psychological harm,[5] the Court of Appeal believed, is now to be relegated to a matter of minor importance,

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5. Threat of imminent death is a known cause of Posttraumatic Stress Disorder. (See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) p. 424.) One need not be a psychologist, though, to know that being threatened with a gun directly against one's head is likely to be extremely traumatic. (See Respondent's Brief 3-4.)

if considered at all, while the mitigating factors put forward for the criminal are "paramount."

Did the United States Supreme Court really turn on a dime, throw all the advances in victims' rights into the trash can, and take us directly back to the Dark Ages of *Booth*? Of course not. The cited page of *Miller* does not say what the Court of Appeal cited it for. It says just the opposite.

In the joined case of *Jackson v. Hobbs*, the *Miller* court said that it was proper to consider Jackson's conduct in the store, whether he was threatening the victims or indicating he thought his friends were only joking (a fact disputed in the case). The court indicated the facts should be considered in light of Jackson's youth and background, to be sure, but there is no indication that these factors are "paramount" in the sense of relegating the defendant's actual criminal acts to minor status. On the contrary, this part of the *Miller* opinion emphasizes *individualized* sentencing (see 132 S.Ct. at pp. 2468-2469, 183 L.Ed.2d at pp. 423-424), which necessarily means the sentencer should consider the facts on both sides of the scale. Just as the high court considered minor participation in the underlying felony in *Lockett* and *Enmund* and contrasted the major participation in *Tison*, so courts considering the sentence in a juvenile LWOP felony-murder case should consider the degree of participation and whether the defendant personally caused or threatened harm to any victim, *whichever* side of the scale these factors come down on.

It is also important to note in this context the victims' rights section of the California Constitution. The people of California have written into their fundamental law a right of victims of crime to be heard in sentencing proceedings. (See Cal. Const., art. I, § 28, subd. (b)(8).) The right to be heard would be meaningless if the sentencer proceeds to ignore what he hears. (Cf. *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-115 & fn. 10.) The court should not assume that the people of California amended the

Constitution for a meaningless ceremony. Victim impact not only *should* be considered, it *must* be considered.

Defendant contends in Part IV of his brief that his sentence is unconstitutionally disproportionate. The Attorney General answers that the claim is not properly before the court. If the court does decide to address it on the merits, the foregoing discussion is sufficient to dispose of the claim. As noted in Part II, *supra*, the United States Supreme Court's capital cases provide an upper limit as to the federal constitutional restrictions on juvenile LWOP. If Moffett had been just a few days older on the day of the crime, his conduct would easily have made him eligible for the death penalty under *Tison* and Penal Code section 190.2, subdivision (d). It is absurd to contend that a small difference in age changes a crime from one eligible for the death penalty to one ineligible even for the lesser sentence of LWOP.

As for the California Constitution, the court should keep in mind that the juvenile LWOP statute was enacted by a vote of the people, the same authority that enacts the Constitution. Certainly juvenile LWOP was not a violation of the state constitutional provision at the time it was enacted. Nor can the statute be declared unconstitutional on an "evolving standards of society" theory when the society itself enacted the statute not that long ago. In *People v. Anderson* (1972) 6 Cal. 3d 628, this court presumed to expand the Cruel or Unusual Punishments provision of the California Constitution to strike down a punishment despite society's continued support for it, and the people of California swiftly repudiated that decision. (See Cal. Const., art. I, § 27.) That mistake should never be repeated.

IV. This case is about 16- and 17-year-old murderers, not "children."

Finally, in light of the unfortunate terminology used by United States Supreme Court in *Miller v. Alabama* (2012) 132 S.Ct. 2455, 2470, 183

L.Ed.2d 407, 425, *amici* believe that a note on choice of words is in order. The holdings of courts are most important, of course, but the way those holdings are expressed also matters.

The word "child," in contemporary American usage, usually refers to a person younger than adolescence. (See American Heritage Dictionary (3d ed. 1992) p. 332; Webster's II New Collegiate Dictionary (3d ed. 2005) p. 198.) Few people today ever refer to teenagers as "children."

It is precisely *because* the word "child" evokes an image of an elementary school youngster that the advocates of lenient sentencing have adopted that word in referring to juvenile offenders. (See, *e.g.*, Human Rights Watch (2005) The Rest of Their Lives: Life without Parole for Child Offenders in the United States.) The mental image that term evokes strikes an emotional chord, but it is a false image. California limits life-without-parole to murderers aged 16 and up, not children. (See Pen. Code, § 190.5, subd. (b).)

In legal usage, as well as common usage, the terms "juvenile" or "minor" are generally the words for referring to the entire class of persons under 18. "Child" is typically reserved for pre-teens. (See Garner, Dictionary of Legal Usage (3d ed. 2011) p. 153.) This court used the term "juvenile" in its most recent opinion in this area, *People v. Caballero* (2012) 55 Cal.4th 262, 265, and *amici* respectfully request that it continue to do so.

Use of the term "children" to refer to 16- and 17-year-old thugs who commit crimes of great violence is profoundly offensive to those who have suffered at their hands. The only child involved in this case is Cody Lasater, born two months after the crime and presently eight years old. He will never know his father because of this crime. Andrew Moffett is not a child.

CONCLUSION

The decision of the Court of Appeal should be reversed.

July 22, 2013

Respectfully Submitted,

KENT S. SCHEIDEGGER

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)

I, Kent S. Scheidegger, hereby certify that the attached brief amici curiae contains 4840 words, as indicated by the computer program used to prepare the brief.

Date: July 22, 2013

Respectfully Submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document by depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

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