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1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 **v.**

NO. 33,354

5 **ODEN GUTIERREZ,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

8 **Sandra A. Price, District Judge**

9 Jorge A. Alvarado, Chief Public Defender

10 J.K. Theodosia Johnson, Assistant Appellate Defender

11 Santa Fe, NM

12 for Appellant

13 Gary K. King, Attorney General

14 Sri Mullis, Assistant Attorney General

15 Santa Fe, NM

16 for Appellee

17 **DISPOSITIONAL ORDER OF AFFIRMANCE**

18 {1} This direct appeal having come before the Supreme Court from an Eleventh

1 Judicial District sentencing, and every member of the Court having studied the briefs,
2 and being otherwise fully informed on the issues and applicable law; and

3 {2} The members of the Court having concurred that there is no reasonable
4 likelihood that a Decision or Opinion would affect the disposition of this appeal or
5 advance the law of the State; and

6 {3} Acting within this Court’s discretion under Rule 12-405(B)(1) NMRA to
7 dispose of a case by order, decision, or memorandum opinion rather than formal
8 opinion;

9 **IT IS THEREFORE ADJUDGED THAT:**

10 {4} Child previously exercised a direct capital appeal to this Court following his
11 original sentencing in this case. This Court issued an opinion, *State v. Gutierrez*,
12 2011-NMSC-024, 258 P.3d 1024, reversing the sentence and remanding the case to
13 the district court for re-sentencing with instructions that a pre-sentence report be
14 prepared and submitted to the district court prior to re-sentencing. *Id.* ¶ 67.

15 {5} On remand, the district court received and reviewed the pre-sentence report, as
16 required by NMSA 1978, Section 31-18-15.3(D) (1993). “To err on the side of
17 caution,” the district court held what it termed an “amenability hearing only as to other
18 counts . . . that [Child] was convicted of *other* than the [first-degree] murder charge.”

1 {6} At the end of the hearing, the district court sentenced Child to “life plus
2 eighteen years” for first-degree murder, aggravated burglary, and armed robbery.

3 {7} In this appeal, Child argues that his sentence of “life plus eighteen years
4 constitutes cruel and unusual punishment” because the sentencing hearing did not take
5 into account the unique mitigating circumstances of adolescence as required by the
6 United States Supreme Court, under *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455
7 (2012).

8 {8} In *Miller*, the United States Supreme Court held that “[a statutory] scheme that
9 mandates life in prison without possibility of parole for juvenile offenders” violates
10 the Eighth Amendment of the United States Constitution’s prohibition against cruel
11 and unusual punishment. *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 2469
12 (2012). A sentencer is required to take into account the unique circumstances of the
13 juvenile offender and the crime when deciding whether to impose a life sentence
14 without the possibility of parole. *Id.* However, *Miller* “[does] not foreclose a
15 sentencer’s ability to make that judgement in homicide cases.” *Id.*

16 {9} Here, the Child’s sentence is not life without the possibility of parole, but life
17 *with* the possibility for parole. Consequently, the Child’s argument that his sentence
18 is on par with the sentence in *Miller*, and thus constitutionally barred, is weaker than

1 it appears on first blush. In addition, the district court acknowledged that the sentence
2 was not mandatory in this case, but it was “very appropriate . . . and [the district court
3 saw] no reason to deviate” from the sentence of life imprisonment after hearing the
4 testimony and taking the circumstances of Child and the crime into account.

5 {10} *Miller* does not stand for the proposition that the Eighth Amendment
6 categorically bars a sentence of life without parole for juveniles. *Miller*, ___ U.S. ___,
7 132 S. Ct. 2455, 2469 (2012). *Miller* only requires that the sentencer weigh the
8 circumstances of the crime before sentencing a juvenile to life without the possibility
9 of parole, instead of imposing a mandatory sentence. Since life *with* the possibility of
10 parole is a lesser sentence, and the district court considered the unique circumstances
11 of the case, the Child’s sentence does not transgress the constitutional standard.

12 {11} The Child does not claim that the district court abused its discretion in the
13 manner in which it considered the evidence and its sentencing decisions. The district
14 court took the unique circumstances of the Child and the crime into account before
15 determining the appropriate sentence. Accordingly, we **AFFIRM** the sentencing.

16 {12} **IT IS SO ORDERED.**

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PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice