STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. IHAB MASALMANI, Defendant-Appellant.	Supreme Court Case No. 154773 Court of Appeals Case No. 325662 Circuit Court Case No. 09-5244-FC

PEOPLE'S BRIEF ON APPEAL

**** ORAL ARGUMENT REQUESTED ****

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DID THE TRIAL COURT PROPERLY WEIGH THE MITIGATING FACTORS ENUNCIATED IN *MILLER V ALABAMA* AND MCL § 769.25 AND DID THE COURT ABUSE ITS DISCRETION IN SENTENCING THE DEFENDANT TO A TERM OF LIFE IMPRISONMENT WITHOUT PAROLE FOR HIS CONVICTION FOR FIRST-DEGREE FELONY MURDER?

Trial Court did not answer

People's Answer: "No"

Defendant's Answer: "Yes"

Court of Appeals' Answer: "No"

COUNTER-STATEMENT OF FACTS

After a trial before Macomb County Circuit Court Judge Diane M. Druzinski ("Judge Druzinski") in September of 2010, a jury convicted Ihab Masalmani ("Masalmani") of Bank Robbery (Reeber) (MCL § 750.531), Armed Robbery (Maynard) (MCL § 750.529), Kidnapping (Maynard) (MCL § 750.349), Armed Robbery (Stepanenko), five counts of Felony Firearm (MCL § 750.227b), Carjacking (Hassroune) (MCL § 750.529a), Receiving and Concealing a Stolen Firearm (MCL § 750.535b), First-Degree Felony Murder (Landry) (MCL § 750.316), Carjacking (Landry), Conspiracy to Commit Carjacking (MCL § 750.157a), Kidnapping (Landry), Conspiracy to Commit Kidnapping, and Larceny from the Person (Landry) (MCL § 750.357). (Appendix, 30a).

On November 4, 2010, Judge Druzinski sentenced Masalmani to a term of life imprisonment without the possibility of parole on his First-Degree Felony Murder conviction, terms of 15 years to 50 years imprisonment on his Bank Robbery, Armed Robbery, Kidnapping convictions in the Flagstar Bank case and his Carjacking conviction in the Walmart/Marshall's case, terms of 25 years to 50 years imprisonment on his Carjacking, Kidnapping, and Conspiracy convictions in the Quizno's case, terms of five years to 10 years imprisonment on his Receiving and Concealing a Stolen Firearm and Larceny from a Person convictions, and two years imprisonment on the five Felony Firearm convictions. (Appendix, 30a).

Masalmani appealed as of right. The Michigan Court of Appeals ("Court of Appeals") affirmed his convictions, but vacated Judge Druzinski's sentence

on Masalmani's conviction for First-Degree Felony Murder and remanded for resentencing consistent with the intervening decisions in *Miller v Alabama*, 132 SCt 2455; 183 LEd2d 407 (2012) and *People v Carp*, Mich App 298 Mich App 472; 828 NW2d 685 (2012) (affirmed at 496 Mich 440; 852 NW2d 801 (2014)). (Appendix, 31a). On September 3, 2012, the Michigan Supreme Court ("Supreme Court") denied Masalmani's application for leave to appeal. (Appendix 38a).

In early 2014, the Michigan Legislature passed MCL § 769.25, which took effect on March 4, 2014. In April of 2014, the prosecution filed a motion under MCL § 769.25(2) requesting imposition of a sentence of life imprisonment without the possibility of parole on the defendant's First-Degree Felony Murder conviction. (Appendix 39a-50a). Pursuant to *Miller* and this new statute, Judge Druzinski conducted a two-day hearing in October of 2014. (Appendix 51a-286a).

The defense called five witnesses. On the first day of testimony, Dr. Daniel P. Keating, a psychology professor at the University of Michigan and an expert in adolescent brain development, testified regarding the scientific underpinnings of the United States Supreme Court's ruling in Miller. (Appendix 61a-124a). Jennifer Keller, a social worker and one of Masalmani's case managers, testified about her interaction with Masalmani from 2001 until approximately 2005 (ages nine to 13) and his three foster care placements during that period. (Appendix 125a-149a). William Ladd, an attorney specializing in representing children in the Wayne County juvenile courts and

Masalmani's attorney in various capacaties from 2001 to 2009, testified regarding his representation of Masalmani in the juvenile justice system. (Appendix 152a-185a).

On the second day of testimony, Dr. Frank Vandervort, a law professor at the University of Michigan and an expert in the field of child welfare and juvenile delinquency proceedings, testified regarding the juvenile justice system in Michigan and Masalmani's experience within that system. (Appendix 192a-224a). Dr. Lyle Danuloff, a licensed psychologist, testified regarding his evaluation of Masalmani. (Appendix 225a-262a). In addition to this testimony, the parties stipulated to the admission of numerous exhibits during this hearing, including Maslamani's disciplinary records from the Michigan Department of Corrections. (Appendix 263a-268a).

On January 6, 2015, Judge Druzinski sentenced Masalmani to life imprisonment without the possibility of parole. (Appendix 345a-370a).

Masalmani appealed as of right. The Court of Appeals affirmed Judge Druzinski's sentence in a per curiam opinion. (Appendix 380a-388a). On April 5, 2019, this Court granted Masalmani's application for leave to appeal. (Appendix 389a).

ARGUMENT

THE TRIAL COURT PROPERLY WEIGHED THE MITIGATING FACTORS ENUNCIATED IN *MILLER V ALABAMA* AND MCL § 769.25 AND DID NOT ABUSE ITS DISCRETION IN SENTENCING THE DEFENDANT TO A TERM OF LIFE IMPRISONMENT WITHOUT PAROLE FOR HIS CONVICTION FOR FIRST-DEGREE FELONY MURDER.

STANDARD OF REVIEW

An appellate court reviews a trial court's decision to sentence a juvenile to life imprisonment without parole for an abuse of discretion. *People v Skinner*, 502 Mich 89, 131-137; 917 NW2d 292 (2018). An appellate court reviews findings of fact by a trial court for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). An appellate court reviews issues of statutory interpretation de novo. *People v Idziak*, 484 Mich 549, 553; 773 NW2d 616 (2009). Questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246, 249 (2002).

ARGUMENT

In *Miller*, supra at 2467-2475, the United States Supreme Court held that mandatory life sentences without the possibility of parole for individuals under the age of 18 were "cruel and unusual" and violated the Eighth Amendment to the United States Constitution. The *Miller* Court observed:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home

> environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. *Id.* at 2468.

Miller, however, rejected arguments for a categorical bar to sentencing juveniles to life in prison without parole, observing that it did not "foreclose a sentencer's ability to make that judgment in homicide cases." *Id.* at 2469. Instead, the opinion emphasized that its holding served to "mandate[] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 2471.

The Michigan Court of Appeals subsequently addressed *Miller* as it applied to Michigan's sentencing scheme in *People v Carp*, 298 Mich App 472; 828 NW2d 685 (2012). In *Carp*, *supra* at 531, the Court of Appeals held that MCL § 791.234(6)(a), which provides that a prisoner sentenced to life imprisonment for First-Degree Murder "is not eligible for parole," was unconstitutional "as written and as applied to juvenile offenders convicted of homicide." According to the *Carp* Court, the statute "fail[ed] to acknowledge a sentencing court's discretion to determine that a convicted juvenile homicide offender may be eligible for parole. *Id.* Ultimately, the Court of Appeals in *Carp*

directed that a trial court, in sentencing a juvenile convicted of First-Degree Murder, must "evaluate and review those characteristics of youth and the circumstances of the offense as delineated in *Miller* and this opinion in determining whether following the imposition of a life sentence the juvenile is to be deemed eligible or not eligible for parole." *Id.* at 538.

After the Court of Appeals' decision in *Carp*, the Michigan Legislature passed MCL § 769.25, which took effect on March 4, 2014. The statute applies to criminal defendants who were less than 18 years of age at the time he or she committed an offense punishable by life imprisonment without the possibility of parole before the act's effective date and "[o]n June 25, 2012 the case was pending in the trial court or the applicable time periods for direct appellate review by state or federal courts have not expired." MCL § 769.25(1)(b)(ii). The statute provides that "[i]f the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described under subsection (1)(b), the prosecuting attorney shall file the motion within 90 days after the effective date of the amendatory act that added this section." Further, the statute indicates that if the assistant prosecuting attorney files such a motion: "the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in *Miller v Alabama*, 576 US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated." MCL § 769.25(6). Finally, "the court shall specify on the record the aggravating and mitigating circumstances

considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing." MCL § 769.25(7).

This Court weighed in on this issue in *People v Carp*, 496 Mich 440; 852 NW2d 801 (2014), affirming the Court of Appeals' decision. In addition, however, this Court, echoing language in *Miller* itself, emphasized that neither the Eighth Amendment to the United States Constitution nor the Michigan Constitution categorically bars a life-without-parole sentence for juvenile homicide offenders, even if that juvenile was convicted on an aiding and abetting theory. *Id.* at 528.

Two years later, the United States Supreme Court held in *Montgomery v Louisiana*, 136 SCt 718; 193 LEd2d 599 (2016), that its decision in *Miller* had retroactive application. In preparation for this eventuality, the State Legislature, in passing MCL § 769.25, had passed MCL § 769.25a, which sets forth a mechanism for resentencing affected defendants. In 2018, in *Skinner*, 502 Mich App at 96-97, 110-126, this Court held that a judge, not a jury, must determine whether to impose a sentence of life imprisonment without parole under MCL § 769.25.

Against this backdrop, this Court has granted leave to appeal "limited to the issue whether, in exercising its discretion to impose a sentence of life without parole (LWOP), the trial court properly considered the "factors listed in *Miller v Alabama*, [567 US 460] (2012)" as potentially mitigating circumstances. MCL 769.25(6). See also *Skinner*, 502 Mich at 113-116." (Appendix 389a).

I. Neither Party Bears the Burden of Proof of Showing that a *Miller* Factor Does or Does Not Suggest a LWOP Sentence.

In its grant of the defendant's application for leave to appeal, this Court asked the parties to address "which party, if any, bears the burden of proof of showing that a *Miller* factor does or does not suggest a LWOP sentence." (Appendix 389a). In *Miller*, the United States Supreme Court did not discuss a burden of proof at such sentencings. Rather, the *Miller* Court simply states that mandatory life imprisonment without parole for a juvenile precludes the trial court's "consideration" of these factors. 567 US at 477. In that regard, *Miller* holds 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." 567 US at 488.

Similarly, the applicable Michigan statute, MCL § 769.25a does not reference a burden of proof at these sentencing. The relevant statute, MCL § 769.25a(6) merely instructs the trial court to conduct a hearing on the prosecuting attorney's motion "as part of the sentencing process" and "consider the factors listed in Miller v Alabama, 576 US . . . ; 183 L Ed 2d 407; 132 S Ct 2455 (2012), any may consider any other criteria relevant to its decision, including the individual's record while incarcerated." Further, MCL § 769.25a(7) provides that the trial court "shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." Finally, the trial court "may

consider evidence presented at trial together with any evidence presented at the sentencing hearing." MCL § 769.25a(7)

Only in *Montgomery*, 136 SCt at 736, does the United States Supreme Court allude to a burden of proof at a *Miller* hearing. At the end of the opinion, Justice Kennedy observed that "[i]n light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736-737. Indeed, this Court, in *Skinner*, 502 Mich at 131, made this observation, noting that "there is language in *Montgomery* that suggests that the juvenile offender bears the burden of showing that life without parole is not the appropriate sentence by introducing mitigating evidence."

Given the overarching thrust of the language in *Miller*/*Montgomery* and MCL § 769.25a, the prosecution submits that neither party bears the burden of showing that a *Miller* factor does or does not suggest a sentence of life imprisonment without the possibility of parole. Traditionally, in the State of Michigan, neither party carries a burden of proof regarding the trial court's imposition of sentence. This interpretation is buoyed by the discussion of *Miller*/*Mongtomery* in *Skinner*, 502 Mich at 131, in which this Court stated:

> Similarly, neither *Miller* nor *Montgomery* imposes a presumption *against* life without parole for those juveniles who have been convicted of first-degree

> murder on either the trial court or the appellate court. *Miller* and *Montgomery* simply require that the trial court consider "an offender's youth and attendant characteristics" before imposing life without parole. *Miller*, 567 US at 483.

Moreover, the *Skinner* Court's holding that "neither Miller nor Montgomery requires this Court to deviate from its traditional abuse-of-discretion standard in reviewing a trial court's decision to impose life without parole" further buttresses the view that a *Miller* hearing is sentencing hearing like any other in the State of Michigan and does not carry with it an applicable burden of proof.

On remand in *Skinner III* (*People v Skinner*, COA No. 317892, the Court of Appeals seized on this language in addressing the defendant's contention that the prosecution carried the burden of proof at a Miller hearing:

> Defendant also argues on appeal that the trial court violated her due process rights when it declined to impose a burden of proof on the prosecution. However, this arguments is governed by our Supreme Court's holding in *Skinner*, 502 Mich at 131. Specifically, our Supreme Court explained that, in sentencing a juvenile defendant to may any explicit findings. *Id.* The trial court need not find that a defendant is irreparably corrupt or that a defendant is a rare juvenile offender. *Id.* Rather, a trial court must simply consider "an offender's youth and attendant characteristics . . . *Id.* at 131 (quotation marks and citation omitted). Moreover, MCL 769.25 does not require the prosecution to meet a burden of proof. Accordingly, the trial court did not err in declining to impose a burden of proof at sentencing.

Under the circumstances, the prosecution maintains that neither party carries a burden of proof at a *Miller* hearing. Given that Judge Druzinski did not

impose a burden of proof on either party at the *Miller* hearing in 2014, no error occurred requiring reversal. (Appendix 345a-370a).

II. In Exercising Its Discretion to Impose a LWOP Sentence, the Trial Court Properly Considered the *Miller* Factors as Potentially Mitigating Circumstances.

A. Chronological Age and Hallmark Features.

In its seminal decision in *Miller*, *supra* at 2468, the United States Supreme Court decided that state criminal sentencing schemes that mandate sentences of life imprisonment without the possibility of parole amount to unconstitutional cruel and unusual punishment, noting, in part, that such statutes "preclude[] consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate the risks and consequences." The *Miller* Court provided a bright-line in considering the defendant's chronological age and his juvenile psychological disposition—18 years old.

i. The Trial Court Gave Proper Consideration to the Defendant's Chronological Age and Its Hallmark Features.

In granting leave to appeal, this Court requested that the parties address "whether the sentencing court gave proper consideration to the defendant's "chronological age and its hallmark features," *Miller*, 567 US at 477-478, by focusing on his proximity to the bright line age of 18 rather than his individual characteristics."

Here, Judge Druzinski, in her written opinion, specifically acknowledged the "hallmark features" of youth and the brain science that underpin the United States Supreme Court's decision in *Miller*:

> The Court must also consider the "hallmark features" of the defendant's age, including immaturity, impetuosity, and failure to appreciate risks. Dr. Keating testified that the limbic system—which serves as "arousal system, . . . an incentive system, and a reward system"—is much more active during one's teenage years than as an adult. *Id.* at 20-21 (Keating). Dr. Keating further testified that the prefrontal cortex governs "executive function" and "is designed as a brake on the [limbic] system but it develops much more slowly than the limbic system." *Id.* at 23 (Keating). He explained that there is a "developmental maturity mismatch" between the limbic system and the prefrontal cortex. *Id.* at 24-25 (Keating). He explained that "[t]he prefrontal cortex . . . doesn't reach full maturity until the mid-20s." *Id.* at 23 (Keating). As a result, teenagers tend to engage in "generally reckless behavior." *Id.* at 28 (Keating). (Appendix 364a).

Given the foregoing, Judge Druzinski "carefully consider[ed]" the "hallmark features" of chronological age at the *Miller* hearing.

Trial courts applying the *Miller* factors are confined by the 18-year age limit and the brain science is, in effect, baked into the holdings in *Miller*/*Montgomery*. As a result, expert testimony like Dr. Keating is of limited utility at a *Miller* hearing where every defendant's limbic system will be overly active and every defendant's prefrontal cortex will be developing. Instead, at a *Miller* hearing, trial courts must examine to evidence adduced regarding the defendant's own chronological age/maturity and determine whether the "hallmark features" of adolescence discussed in *Miller*, including immaturity,

impetuosity, and a failure to appreciate risks in consequences, played any role in the defendant's crimes.

Here, the defendant was 17 years and eight months when he ruthlessly executed Matthew Landry in a secluded Detroit drug den several hours after abducting him after he had methodically used his victim to obtain cash and a vehicle. (Appendix 293a-297a). By contrast, as Judge Druzinski observed, *Miller* itself "dealt with juvenile defendants who were a mere 14-years old at the time of their offenses, a far cry from this case." (Appendix 365a). The defense introduced no testimony or evidence at the resentencing hearing demonstrating that the defendant was unusually immature or impetuous for a nearly-18-year old. Instead, the defendant's guardian ad litem testified at the resentencing hearing that, maturity-wise, the defendant "was probably in the middle out of the 5,000 to 8,000 children he had represented over the years." (Appendix 365a). Finally, Judge Druzinski found that the defendant "did exhibit some level of maturity." (Appendix 352a).

In this regard, the United State Supreme Court expressly indicated in *Miller* that it was appropriate to take into account the differences between juveniles of different ages. More specifically, in explaining the defects of a scheme mandating life imprisonment without the possibility of parole for juveniles, the Court stated: "Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." *Miller*, 132 S Ct at 2467-2468. In fact, Justice

Kennedy criticized the dissents in *Miller* for continually referring to 17-year-olds who have committed brutal crimes and comparing those defendants to the 14-year-old defendants in *Miller*, explaining: "Our holding requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes. By contrast, the sentencing schemes that the dissents find permissible altogether preclude considering these factors." *Id.* at 2469 n 8. In other words, treating 14-year-olds the same as 17-year-olds is exactly what the ruling in *Miller* sought to end and, thus, Judge Druzinski did not err in focusing on the defendant's individual age/maturity in analyzing the *Miller* factors.

The most significant aspect of this factor lies, however, in the line that *Miller* "drew . . . between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery*, 577 US at ___. Judge Druzinski, who sat through the defendant's entire trial and conducted the *Miller* hearing, observed, "there was no impulsiveness or failure to appreciate risks when he kidnapped and kept Mr. Landry alive for at least eight hours before killing him." (Appendix 352a). Moreover, the Court of Appeals stated:

> The record refutes any claim that the hallmark features of adolescence identified in *Miller*, 132 S Ct at 2468, including immaturity, impetuosity, and a failure to appreciate risks and consequences, played any role in defendant's crimes. This was not, as in *Miller*, 132 S Ct at 2465, a mere botched robbery that turned into a killing. Defendant engaged in an unusually horrific, disturbing, and violent crime spree that extended over a three-day period. Defendant, aided by codefendant

> Robert Taylor, brazenly and forcibly kidnapped and carjacked Matt Landry in broad daylight outside a restaurant, punched and dragged him by the neck, drove his car, held him captive for at least seven hours, used his ATM card to steal his money and buy numerous items. He then took Landry to a drug house where defendant bought and consumed crack cocaine. Finally, defendant took Landry to a nearby vacant house where he killed him in a brutal execution style by shooting him in the back of the head. Defendant then committed additional violent crimes over the next two days, including robbing a bank and its customers, kidnapping a bank customer, and another carjacking. Landry's significantly decomposed body was found two days later inside the vacant burned out house where he had been shot in the back of the head. From the position of the body, it appeared that Landry had been kneeling at the time of his murder. Defendant's criminal actions over an extended period of time are not reflective of a merely immature or impetuous adolescent who fails to appreciate risks and consequences. (Appendix 383a).

Working within *Miller*'s framework, Judge Druzinski did not err in concluding that the defendant's chronological age and its hallmark features did not weigh in favor of mitigation.

B. Family and Home Environment

Also in *Miller, supra* at 2468, the United States Supreme Court observed that such mandatory sentencing schemes for juveniles "prevent[] taking into account the family and home environment that surrounds him—and from he cannot usually extricate himself—no matter how brutal or dysfunctional."

Here, Judge Druzinski noted that the evidence at the resentencing hearing was "essentially uncontroverted" that the defendant's "family and home environment were terrible." (Appendix 365a). As the defendant was "moved from one foster care placement to another, he lost the ability to form

attachments with parental figures and became more oriented toward being out on the streets." (Appendix 384a). At school, the defendant "struggled academically and began getting into fights and exhibiting disrespect to his teachers." (Appendix 384a). The defendant "had delinquency cases for assault and drug offenses; he pleaded guilty to misdemeanors and became a delinquent court ward." (Appendix 384a). Given the testimony and evidence adduced at the *Miller* hearing, the trial court did not err in concluding that "this factor likely weighs in defendant's favor against a life sentence without the possibility of parole." (Appendix 353a).

C. Circumstances of the Homicide Offense

The *Miller* court, in holding that mandatorily sentencing a juvenile to life imprisonment without the possibility of parole violated the Eight Amendment, observed that such a scheme "neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and way familial and peer pressures may have affected him." *Id.* at 2468. The defendant, along with his co-defendant, brazenly kidnapped and carjacked Matthew Landry in broad daylight in Eastpointe and, several hours later, brutally executed him inside a burnt-out drug in Detroit. (Appendix 293a-297a). The defendant committed two more violent crimes over the next few days, using Matthew Landry's green Honda as a getaway vehicle. (Appendix 293-297a). Nothing in the testimony or evidence from the resentencing hearing suggested that the defendant's crime spree was the result of familial or peer pressure. (Appendix 367a).

Judge Druzinski observed that the defendant "had numerous opportunities to abandon his plan, and instead d[r]ove with his co-defendant and Matthew Landry around town for hours before killing Landry in cold blood execution style in a vacant home." (Appendix 355a). In other words, the circumstances surrounding this murder were not a mitigating factor under *Miller*: "There is nothing in the facts and circumstances of the crime which would warrant anything less than life in prison without the possibility of parole." (Appendix 355a). As the Court of Appeals observed: "Given the defendant's extensive participation in these disturbing criminal acts and the absence of any family or peer pressure on defendant, the trial court did not err in heavily weighing this factor against defendant and concluding that it did not favor mitigation." (Appendix 384a).

D. Incapacities of Youth

In *Miller*, *supra* at 2468, the United States Supreme Court, in striking down sentencing schemes that mandate life in prison without the possibility of parole for juvenile offenders, observed that such systems "ignore[] that [the defendant] might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." Here, at the resentencing hearing, the defense did not even contest that the defendant may have been charged with a lesser crime if not for his age. As Judge Druzinski concluded, "[t]here is no evidence that at the incapacities of youth caused defendant to be unable to

participate in his defense . . . [n]or is there any evidence that he implicated himself due to youthful incapacities." (Appendix 384a). As a result, she did not err in determining that this *Miller* factor did not weigh in favor of mitigation.

E. Possibility of Rehabilitation

Finally, *Miller*, *supra* at 2468, in ruling that a juvenile offender may not be automatically sentenced to life without the possibility of parole without offending the Eighth Amendment, stated that "this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it."

Judge Druzinski did not err in concluding that this *Miller* factor did not weigh in favor of mitigation. (Appendix 355a-357a). The utter depravity of the defendant's vicious crime spree suggests that the defendant is wholly incapable of rehabilitation. Moreover, the relevant statute, MCL § 769.25(6), provides that, at a resentencing hearing, the trial court must consider the *Miller* factors, as well as "any other criteria relevant to its decision, including the individual's record while incarcerated." Incredibly, the defendant amassed "23 major misconduct violations" after his incarceration with the Michigan Department of Corrections. (Appendix 386a). As the Court of Appeals observed:

> Defendant continued engaging in assaultive behavior after being incarcerated for the present offenses. He assaulted or attempted to assault staff personnel at the Macomb County Jail several times. After being transferred to prison, defendant incurred 23 misconduct tickets. Four of the tickets were for fighting, two were for possessing a weapon, one was for assault and battery of another prisoner, and another one was for assault resulting in serious physical injury to another prisoner. (Appendix 386a).

Given the foregoing, the appellate record fully supports Judge Druzinski's determination that the "defendant's prospects for rehabilitation are negligible." (Appendix 357a).

Significantly, the defense at the *Miller* hearing was entirely unable to introduce any testimony or evidence tending to show that the defendant had any real prospects for rehabilitation. Dr. Keating declined to make any prediction for the defendant regarding his rehabilitation. (Appendix, 93a-97a, 105a-107a). Even so, as Judge Druzinski noted in her ruling, Dr. Keating "acknowledged that the rehabilitation challenges are certainly higher in the case of a juvenile who is capable of pulling a trigger" and that "the worse the circumstances, the more likely it is for nonresilience, no rehabilitation to be the case." (Appendix 368a).

Notably, Dr. Lyle Danuloff ("Dr. Danuloff"), the licensed psychologist who evaluated the defendant for the defense just prior to the *Miller* hearing and approximately five years after he murdered Matthew Landry, testified that the defendant told him that his crimes were "both" righteous and evil. (Appendix 241a-242a). Further, the defendant told Dr. Danuloff that "he didn't have any choice" but to commit these crimes. (Appendix 242a). Dr. Danuloff, like Dr. Keating, testified that he could not predict the defendant's future outcome. (Appendix 243a-244a). Dr. Danuloff conceded that the diagnosis is "not rosy" for individuals who suffer from antisocial personality disorder who willingly seek psychotherapy. (Appendix 254a). The defendant, who suffers from antisocial personality disorder, is in lockdown 23 hours a day and will have no

opportunity for any treatment whatsoever. (Appendix 254a-256a). Dr. Danuloff testified that the defendant, when he committed these crimes, was "unsocialized, unattached . . . in any kind of substantial way, . . . lived on the streets, . . . and lived not so much . . . an immoral life, but lived an amoral life." (Appendix 234a). The defendant "didn't live with a sense of mortality, he lived with the sense of what do I need and what do I need to do to get my needs met." (Appendix 234a). Despite all this, as well as the defendant's statement to Dr. Danuloff regarding "righteousness" and "evil," Dr. Danuloff testified that the defendant was "lucky" because, as a result of the United States Supreme Court's decision in *Miller*, "something was happening inside of" the defendant that Dr. Danuloff was unable to define that was "very primitive" and "embryonic." (Appendix 238a). At the same, Dr. Danuloff conceded that the defendant, given his diagnosis of antisocial personality disorder, was manipulative. (Appendix 254a). Surely such testimony does not constitute evidence that the defendant has any real prospects for rehabilitation.

i. The Trial Court Properly Considered the Defendant's Family/Home Environment and the Lack of Available Treatment Programs as They Relate to the Defendant's Potential for Rehabilitation.

In its grant of leave to appeal, this Court directed the parties to address "whether the trial court properly considered the defendant's family and home environment, which the court characterized as "terrible," and the lack of available treatment programs in the Department of Corrections as weighing against his potential for rehabilitation." (Appendix 389a).

In her ruling, Judge Druzinski stated:

> . . . The very difficulty of defendant's upbringing, the only factor which could be said to weigh in favor of an indeterminate sentence, also suggests that defendant's prospects for rehabilitation are minimal. None of the experts presented by the defendant were ready to testify that defendant has undergone anything more than the first embryonic stirrings of moral sensibility. The Court finds it rather telling that defendant only began to avoid misconducts once the possibility of parole became a reality with the Supreme Court's decision in *Miller*. Moreover, the Court finds it incredibly troubling that defendant continues to believe that his cold-blooded murder of Matthew Landry was partially righteous. Finally, the Court notes that even if defendant is experiencing the embryonic development of a rudimentary moral sensibility, it is implausible that he will experience full rehabilitation without intensive professional assistance, assistance which he is very unlikely to receive in prison. (Appendix 357a).

A review of the appellate record demonstrates that Judge Druzinski's findings are fully supported by the witnesses presented by the defense at the *Miller* hearing.

As indicated, this final *Miller* factor focuses on the defendant's potential for rehabilitation. Further, it is undisputed that the defendant experienced a "terrible" family and home environment. However, Dr. Keating testified cross-examination:

> It is certainly the case that patterns of behavior are predictive. Whether they're predictive with any certainty in a particular case is something that would be much harder to say. So it's certainly the case just like the more risks there are or the more negative experiences that an individual has had during their developmental period, on average that will indicate a higher risk for not good outcome for that individual, but the distinction between those individuals who will potentially rise above those early very serious difficulties and those who don't is very hard to discern

> at that point in time. That's always a retrospective thing. So the area of literature in this respect is what's known as the resilience literature. Resilience indicates that individuals who have had very negative experiences and themselves have been involved in variety of negative kinds of behaviors, the prediction on average is that there is a lower probability that they will in fact be able to succeed. Nevertheless, there's always a percentage of such individuals who do, nevertheless succeed. The distinction between resilient and nonresilient individuals, the resilient individuals would be a minority, the nonresilient individuals would be the majority, and the more exposures to bad stuff or bad actions the individual had committed are – increases the percentage of nonresilient versus resilient, right. (Appendix 105a-106a).

Further, as the Court of Appeals noted, Dr. Keating told Judge Druzinski that "[g]reater rehabilitation challenges exist for someone who purposely shot another." (Appendix 385a).

Subsequent to Dr. Keating's testimony for the defendant's prospects for rehabilitation, Dr. Danuloff conceded during cross-examination that individuals ordinarily cannot fix psychological problems by themselves and that psychotherapy is necessary. (Appendix 253a-254a). Moreover, he testified that it was not his "experience" that individuals like the defendant, diagnosed with Antisocial Personality Disorder, "willingly come in for psychotherapy" and "the prognosis for mandated treatment is less than rosy." (Appendix 254a). At the *Miller* hearing, the defense presented no evidence whatsoever the defendant was undergoing intensive psychotherapy of any kind in the Michigan Department of Corrections or that the defendant intended to engage in intensive psychotherapy while inside the Michigan Department of Corrections. As the Court of Appeals wrote, "Dr. Danuloff's testimony supports the trial

court's conclusion that defendant is unlikely to make significant progress without professional assistance, and no basis exists to conclude that he will receive intensive professional assistance in prison and achieve full rehabilitation." (Appendix 386a).

Thus, "[a]lthough the difficulty of defendant's upbringing weighs in his favor, it also indicates that he faces significant challenges in improving himself as reflected in the testimony of Dr. Keating and Dr. Danuloff." (Appendix 385a). At the same time, the appellate record is barren of any evidence or testimony regarding the defendant's rehabilitative efforts and neither party appears to contest that the Michigan Department of Corrections lacks available treatment programs. As a result, the trial court, based on the defense testimony at the *Miller* hearing, properly considered the defendant's family and home environment, at least in part, as not favoring mitigation as it relates to his potential for rehabilitation.

RELIEF REQUESTED

The People respectfully requests that this Honorable Court **AFFIRM** the trial court's sentence of Life Imprisonment Without Parole on the defendant's conviction for First-Degree Felony Murder.

Respectfully Submitted,

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