

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Stephen L. Borrello, PJ, Jane E. Markey, and Michael J. Riordan, JJ

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

IHAB MASALMANI,

Defendant-Appellant.

Supreme Court No. 154773

Court of Appeals No. 325662

Circuit Court No. 09-5244FC

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Oral Argument Requested

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Statement of Jurisdiction

Ihab Masalmani appealed as of right from the trial court's re-imposition of a sentence of life without parole, following a *Miller* hearing. (Appendix, 25a, 371a). On September 22, 2016, the Court of Appeals affirmed. (Appendix, 380a-387a). On April 5, 2019, this Honorable Court granted Mr. Masalmani's application for leave to appeal that was timely filed on November 17, 2016. (Appendix, 28a-29a, 389a). This Court has jurisdiction. MCL 600.215; MCR 7.303(B)(1).

Statement of Questions Presented

- I. Must the government bear the burden of proof at a *Miller* hearing, consistent with juveniles' state and federal constitutional rights to due process and to be free from cruel and/or unusual punishment?**

Court of Appeals made no answer.

Ihab Masalmani answers, "Yes."

Alternatively, should this Court overrule its decision in *Skinner* and hold that there is a presumption against LWOP sentences for juveniles?

Court of Appeals made no answer.

Ihab Masalmani answers, "Yes."

- II. Did the trial court reversibly err in its consideration of the *Miller* factors by treating them as aggravators? Did the trial court deprive Mr. Masalmani of individualized sentencing, in violation of his state and federal rights to be free from cruel and/or unusual punishment?**

Court of Appeals answers, "No."

Ihab Masalmani answers, "Yes."

Argument Summary

In Michigan, the burden of proof generally falls upon the moving party. When a juvenile is convicted of first-degree murder, the sentencing requirements of *Miller v Alabama* and MCL 769.25 come into play. The government makes the decision whether to seek life without parole for that juvenile by filing a motion. As a matter of due process, the government should bear the burden of proof at the *Miller* hearing. Further, the majority of states that have considered the issue decided that in the context of *Miller* sentencings, the government must bear the burden of proof. This Court should hold the same and can do so consistent with its recent decision in *People v Skinner*.

Alternatively, Mr. Masalmani asserts that this Court should find there is a presumption in favor of a term of years sentence in *Miller* sentencings. The Supreme Court of the United States' repeated insistence that life without parole for juvenile homicide offenders must be "rare" is tantamount to such a presumption and a majority of the states that have considered this issue found the same.

Regardless of how the Court decides the burden question, the trial court abused its discretion when it made several legal errors in its consideration of the *Miller* factors in Ihab Masalmani's case. This Court should find that the trial court erroneously considered the *Miller* factors as aggravators, rather than for their mitigating effect, as required by *Miller* and *Skinner*. It should further find that the trial court failed to individually sentence Mr. Masalmani as required by *Miller* and Michigan's sentencing jurisprudence. Mr. Masalmani did not receive the individualized sentencing required by law. Each of these errors requires this Court to vacate Mr. Masalmani's sentence of life without the possibility of parole and remand for resentencing.

Statement of Facts

Ihab Masalmani was born on December 25, 1991 in Libya. Throughout his childhood, Ihab suffered a series of abandonments by his family and those who were responsible for his care. (Appendix, 137a, 155a, 162a, 210a-211a, 216a). Ihab was exposed to drugs, sex, and gangs from a young age. (Appendix, 138a, 162a-163a, 212a). A great deal of this trauma was inflicted while he was in the foster care system. (Appendix, 197a-217a).

Ihab was born in a part of the world where he was exposed to violence and civil unrest. This led his family to relocate and his parents to separate.

Ihab spent his early childhood years living with his parents in Libya and Lebanon. (Appendix, 319a). His early memories are of a chaotic and stressful home where he did not feel safe. (*Id.*). Before he was eight years old, Ihab witnessed violence related to civil and religious conflicts in the countries where he lived. (*Id.*). This included watching a man fall from the top of a tall building and dying in front of Ihab. (*Id.*). These same conflicts forced Ihab's family to move to Lebanon. (*Id.*). Ihab's father left the family around that time, leaving his mother to care for Ihab and his two siblings on her own. (Appendix, 156a-157a, 210a).

Ihab was sent to the United States as a child, accompanied only by his ten-year-old sister.

When he was eight years old, Ihab's mother sent him and his ten-year-old sister, Torfa, to the United States. (Appendix, 155a, 157a). Torfa had medical issues, including juvenile diabetes, and their mother hoped Torfa would receive better care in the United States. (Appendix, 154a, 319a). She also hoped both children would receive a better education. (Appendix, 319a-320a).

Ihab and Torfa traveled without an adult to Florida, where they were held in an immigration detention center. (Appendix, 154a-156a). Ihab and Torfa did not speak English and had no significant relationships with anyone living in the United States. (Appendix, 132a-133a, 154a-156a, 212a-213a).

For the next year or two, Ihab and Torfa were shuffled around to the homes of distant relatives in Florida, California, and Michigan. (Appendix, 154a-156a, 319a). Once in Michigan, Ihab and Torfa lived with an aunt in Dearborn. (Appendix, 153a-154a). They were removed from the aunt's home after the government investigated allegations that both Ihab and Torfa were being physically and sexually abused and neglected. (Appendix, 153a-156a). Ihab and Torfa were separated and placed in emergency shelters. (Appendix, 154a).

Initially, the Family Independence Agency wanted to send Ihab and Torfa "back to their country of origin." (Appendix, 156a). However, the agency was unable to determine that there was a safe and suitable home for them there. (Appendix, 156a). At the time, Ihab's mother was going back and forth between Lebanon and Syria. (Appendix, 157a).

One of Ihab's caseworkers, Jennifer Keller, remembers that when she first met Ihab as a child, she had the impression "[t]hat he was a scared boy. He didn't quite know what was going on." (Appendix, 132a). Ms. Keller characterized Ihab's background up until that point as "[c]haotic," and "[t]raumatic." (Appendix, 132a).

Ihab entered foster care at the age of ten and became a permanent ward of the state.

From the outset, Ihab's experiences in the child welfare system were traumatic. When he entered the system, his English skills were still "not very good," and caseworkers had to arrange interpretation services. (Appendix, 134a). Records show he continuously grappled

with self-identification and his place in the communities in which he lived, which is not surprising given that Ihab was an Arabic refugee. (Appendix, 319a). Ihab also suffered from conditions that presented him with additional challenges, including pediatric seizures, Attention-Deficit/Hyperactivity Disorder (“ADHD”), and depression. (Appendix, 135a).

When he was about 10 years old, Ihab and his sister were given the choice to individually decide whether they wanted to return to Lebanon to live with their mother or remain in the United States. (Appendix, 133a-134a). Ihab’s sister Torfa went back to Lebanon, while Ihab chose to remain in the United States. (Appendix, 215a-216a). It was not until later in the progression of the child welfare case that Ihab’s mother expressed interest in having Ihab return to her. (Appendix, 157a).

This separation represented the loss of a significant relationship for Ihab and a lost opportunity for family support, which is critical during a juvenile’s development. (Appendix, 78a-80a). According to Professor Frank Vandervort, an expert in child welfare and juvenile delinquency proceedings, this is normally “not a decision that we let children make.” (Appendix, 79a).

Realities of the foster care system resulted in fragmented, inadequate care and services.

As Ihab grew up in the foster care system, he never received the comprehensive needs assessment or service plan required by law; instead he received only piecemeal services that were incomplete and inadequate. (Appendix, 206a-207a). This was especially critical for Ihab because his needs were unique and so specific to his background. (Appendix, 212a-213a). Ihab experienced a language barrier and faced additional challenges because he was in the United States without appropriate documentation or any family connections.

(Appendix, 133a, 212a-213a). Further, the Department of Human Services (DHS) was precluded by federal law from considering race or national origin in placing Ihab in a foster home if consideration of such factors would delay his placement. (Appendix, 213a-214a). As a result, almost none of Ihab's foster parents were Arab American or lived in Arab American communities. (Appendix, 138a-139a, 148a).

At times, Ihab's caseworker, Ms. Keller, disagreed with DHS or service providers about what was best for him. (Appendix, 133a, 139a). For example, Ms. Keller repeatedly requested Ihab receive an individualized educational plan (IEP) to help with his struggles in school, but the school district decided Ihab did not qualify for an IEP. (Appendix, 139a). Only after Ihab continued to struggle in school and Ms. Keller persisted in her requests, did Ihab get the IEP he needed. (*Id.*). When special education services, such as tutoring through the Sylvan Learning Center, were made available to Ihab, he enjoyed them and wanted to go. (Appendix, 140a).

During his early teenage years, DHS made placement decisions for Ihab based on the agency's general policies favoring adoptive homes, rather than making placement decisions based upon his specific needs. (Appendix, 207a-210a). This included permanently removing Ihab from the long-term, non-adoptive foster home of Ms. Christine Day, with whom he had bonded, because her home was not a pre-adoptive placement. (Appendix, 164a-166a, 207a-210a). Professor Vandervort testified, "[f]or this young man it may well have been a much better option to leave him in what we would consider a temporary foster home placement...it would likely have been better for him to maintain that temporary sort of somewhat unstable placement as opposed to seeking adoption." (Appendix, 208a). This is because Ihab had spent four years in foster placement with Ms. Day, where he adjusted fairly well and formed

a significant attachment to Ms. Day. (Appendix, 162a, 209a-210a).

Kids like Ihab who are transferred to many different placements during their childhood often struggle as a result. Ihab's guardian ad litem William Ladd testified:

He was in a number of placements, at least ten and I think progressively it made it worse and worse for him. Kids have difficulties with having a sense of stability and having a sense of belonging and having a sense of attachment. If they keep being moved, then they have no sense of security. And he kept being moved. He had, essentially he had a whole childhood of disappointments and the disappointments were frequently those moves from his placements or the placements were not appropriate.

(Appendix, 162a).

Ihab was also affected by the quality of some of his foster placements. During his early teenage years, he spent a year and a half living in a foster home where the foster mother used marijuana with him and had sexual relations in his presence. (Appendix, 139a, 166a). During this time, Ihab was living on the northeast side of Detroit and became involved with gangs as he became "more and more oriented towards being with kids on the street." (Appendix, 162a, 166a).

Ihab consistently expressed a desire to better himself and formed bonds with positive figures.

Notwithstanding the considerable trauma, ineffective parenting, and chaotic home situations Ihab endured throughout his childhood, Ihab was able to form attachments with positive people in his life, including his foster mother Ms. Day, his case worker Ms. Keller, and Mr. Ladd.

Ms. Keller testified that she worked extensively with Ihab for years, during which time she saw him weekly, if not more. (Appendix, 142a). Ihab "always" exhibited appropriate

emotions towards Ms. Keller. (*Id.*). Ms. Keller would talk to him about his behaviors when he acted out in negative ways. (Appendix, 140a, 142a). Ihab “was very remorseful” and would tell her that he did not understand why he acted that way or why he could not control his behavior. (Appendix, 143a). She could always see that Ihab was trying the best he could to change his behaviors. (*Id.*). In her experience as a children’s case worker, Ms. Keller has come across kids where she felt it was inevitable that the child would end up in the criminal justice system; Ihab was not one of those kids. (Appendix, 148a-149a).

Mr. Ladd worked with Ihab from 2001 through 2009, when Ihab was between about ten and 18 years old. (Appendix, 157a). He found Ihab to be immature for his age, even into his teenage years. (Appendix, 158a). Mr. Ladd testified:

[A]ll of the children that I represented have been kids who were involved or troubled kids or are in difficult circumstances based upon their home situations. So they haven’t had positive family experiences. In terms of maturity, Ihab was probably in the middle. That’s not very mature compared to the general population. And in terms of being able to deal with them, he was one of the easiest kids to deal with from my point of view.

(Appendix, 159a). Like Ms. Keller, Mr. Ladd would confront Ihab when he acted out and Ihab was “good about recognizing that there were certain problems.” (Appendix, 159a). Ihab made efforts to adapt to the difficult situations he was in and was successful when the circumstances were right, such as in the Boysville program, which Ihab successfully completed. (Appendix, 179a-180a). Further, Mr. Ladd found that what Ihab really needed was consistency:

Unfortunately, because he kept being moved around, he had various patterns of treatment, he had various people that were dealing with him, he had more and more difficulty responding to people. I was a constant in his life. He knew that I was always there and he knew that I would be responsive to him and listen

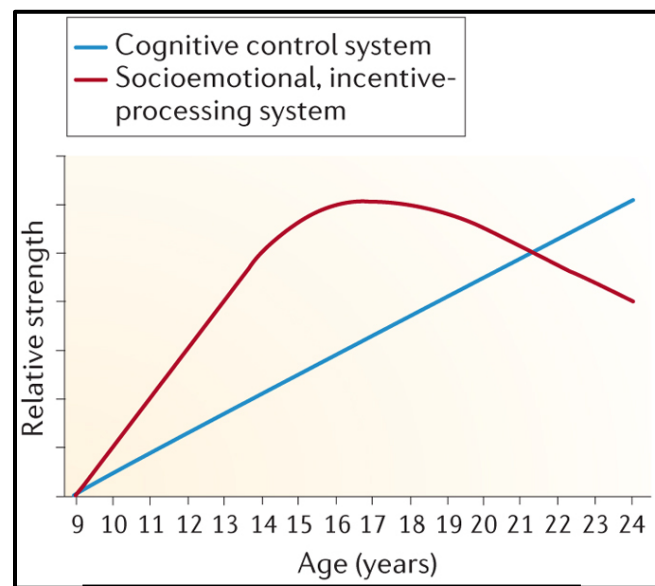
to him so he was responsive to me. Other people he had more difficulty trusting them and that was understandable.

(Appendix, 180a-181a).

Social science relied upon by the United States Supreme Court established that 17-year-olds, like Ihab, are fundamentally different from adults.

Children are fundamentally different when it comes to brain development. (Appendix, 66a-85a). Studies about these differences in the field of neuroscience served as a basis for the United States Supreme Court’s decision in *Miller v Alabama*, 567 US 460, 471-472; 132 S Ct 2455 (2012).

The limbic system (or “bottom brain”), which includes the brain’s arousal, incentive, and reward systems, functions as the trigger for a lot of emotional reactions. (Appendix, 69a-70a). The bottom brain develops and becomes much more activated around the ages of 13 or 14, at a level that is generally higher than a mature adult will ever experience. (Appendix, 71a). The only brake on the bottom brain is the prefrontal cortex (or “top brain”), which controls higher level brain functions like judgment, decision-making, and impulse control. (Appendix, 69a, 72a-73a). However, the top brain develops in a linear fashion and does not reach full maturity until the mid-20s. (Appendix, 73a-74a). The difference between the fast-developing bottom brain and slower developing top brain is called a developmental maturity mismatch, (Appendix, 74a-75a), and is depicted in the figure (right).



Appendix, 290a

The adolescent development maturity mismatch manifests itself in several different ways that lead youth to behave differently from mature adults. (Appendix, 75a). For example, when adolescents are in arousing or high emotion situations, impulsivity is more likely to prevail than good judgment, leading adolescents to make poor choices. (*Id.*). Once engaged in negative activities, adolescents become fully absorbed and lack the capacity to reflect on how or whether they should cease those negative activities. (*Id.*). Dr. Daniel Keating, an expert in adolescent brain development, explained how one bad decision by an adolescent can have a devastating spiraling effect:

So in a sense [the adolescent is] on the train and it's moving before they've even thought about is it a good idea to get on that train, right...once engaged in an activity...they are then kind of fully absorbed in executing that plan, so what limited prefrontal cortex abilities they have are engaged in carrying out the plan they're engaged in. They have very little left over to think about, "Gee, should I get off this train," or "Maybe I should get off this train but I have no idea how to get off this train," right. So the ability both to resist getting onto a path that is not -- that is bad, right, so that it reflects poor impulsive judgment, or having the capacity to change that path, get off the train at some later point, is another version of that developmental maturity mismatch.

(Appendix, 75a-76a).

Generally, when compared to mature adults, adolescents have a reduced ability to make decisions and control their impulses in a complex or emotionally charged situation. (Appendix, 287a-289a). They also suffer from a reduced ability to manage their emotions. (Appendix, 288a-289a). In general, and especially in the presence of peers, teenagers place more value on the potential benefits of a certain behavior, rather than fully considering the risks. (Appendix, 289a). For an individual who has suffered from a traumatic early life or significant adverse childhood experiences, these characteristics are likely to be even more pronounced. (Appendix, 81a-82a). On the other hand, because of their incomplete brain

development, adolescents are far more likely to change or be rehabilitated than older offenders. (Appendix, 290a-291a).

There is no scientific basis supporting the bright-line legal rules that treat a 17-year-old as a juvenile and an 18-year-old as an adult. (Appendix, 82a-85a). In contrast, the science suggests that the developmental maturity mismatch continues through the early-20s, and that full developmental maturity is not reached until the mid-20s. (*Id.*).

The Sentencing Offense

On August 9, 2009, when he was 17 years old, Ihab had run away from his placement and was living in a vacant house in Detroit. As observed by social worker Nicole George, “[a]t the time, he decided to take his life into his own hands, surviving in each moment as it presented itself.” (Appendix, 320a).

That day, Ihab and Robert Taylor kidnapped Matthew Landry and stole his car. (Appendix, 293a-294a). Over the next few days, Ihab used Mr. Landry’s ATM card and car, bought, and used crack cocaine, robbed a bank, and made an unsuccessful attempt to commit a carjacking. (Appendix, 294a-297a). At the time of his trial, Ihab denied responsibility for his actions, but by the time of his hearing he was able to admit that he alone is responsible for Mr. Landry’s kidnapping and death. (Appendix, 324a). He reports that Mr. Taylor went along with the kidnapping, but it was not planned. (*Id.*). Mr. Taylor was not present when Ihab killed Mr. Landry, by shooting him in the head. (*Id.*).

Ihab accepts complete responsibility for his crimes and feels genuine remorse for his actions. (Appendix, 323a-324a, 325a-326a). Ihab has shown insight into his choices, the seriousness of his offense, and his past destructive behaviors. (Appendix, 324a). In

interviews with a social worker, he described the circumstances of his offense, taking responsibility and showing appropriate remorse. (Appendix, 323a-324a, 325a-326a). Ihab repeatedly expressed his desire to apologize to the people hurt by his crimes, while simultaneously recognizing that there are no words he could say that would ever make up for the life he took. (Appendix, 325a-326a). Ihab himself reflected:

I have come to a more honest place in myself and am more able to take responsibility. I take full responsibility of my own actions and cannot allow anyone to be blamed or to be held accountable for my wrong doings. I have caused irreparable harm to a family's lives and hurt them and many others.

(Appendix, 324a).

At the time of his hearing, Ihab had already made significant efforts and progress towards rehabilitation.

At the time of the *Miller* hearing, Ihab was 22 years old and had been incarcerated for about five years. During the early years of his incarceration, Ihab took advantage of the limited resources available to him and made demonstrable progress towards rehabilitation. (Appendix, 241a). Ihab had a rough start when he first arrived in the Department of Corrections, which is not uncommon for young men who are incarcerated in prison for the first time. (Appendix, 321a).

Over the years, Ihab made significant progress. (Appendix, 239a). Some of this was the result of Ihab's maturation consistent with his chronological age and natural brain development, which was still continuing as he entered his early-mid-20s. (Appendix, 82a-85a). Some of Ihab's progress was due to his own self-help efforts and the time he spent incarcerated. (Appendix, 238a-240a).

Ihab used his incarceration as an opportunity to focus on gaining tools for continued rehabilitation. (Appendix, 238a-240a). For example, Ihab made it a goal for himself to avoid getting misconducts in prison. (Appendix, 238a-239a). Toward that end, he makes active efforts to exercise self-control when interacting with other prisoners, in order give himself space to think before acting. (Appendix, 239a). Using these techniques, Ihab avoided getting any misconducts for well over a year before his hearing, showing that not only did he make active efforts towards rehabilitation, but that those efforts worked. (Appendix, 239a). Dr. Lyle Danuloff, an expert in psychology, observed, "he does the best he can to stay in his head and think which is quite different than the young man who was out on the streets who -- the only thinking that he did then in that amoral way was, what do I need and how do I get it." (Appendix, 239a).

At the time of the *Miller* hearing, Ihab was working as the barber for the other prisoners in his cell block. (Appendix, 240a). He was also participating in GED programming and served as the representative for his cell block, which required regular meetings with the warden of his facility. (Appendix, 239a-240a). While his criminal history is wrought with non-compliance, his incarceration has shown him to be more compliant as he ages and matures. (Appendix, 321a-322a). Ihab indicates that his incarceration has had a significant impact on him and how he thinks about the world, himself, and how he makes choices. (Appendix, 318a).

During the time Ihab spent in segregation, or solitary confinement, he began to read a lot of books, such as the Bible and other books about religion, morality, and how people relate to one another. (Appendix, 237a-238a). Through these efforts, Ihab further developed his ability to self-reflect. (Appendix, 238a). This skill set is important because the ability to

self-reflect is part of the executive brain functions that do not fully develop until the early to mid-20s (Resentencing, 10/21/14 32-35), and because self-directed change like this is always more influential on individuals because “[i]t’s coming from within.” (Appendix, 232a-233a). Dr. Danuloff evaluated Ihab for the purpose of this resentencing and concluded that Ihab has a capacity for rehabilitation that warrants a term of years. (Appendix, 232a-233a, 245a-246a).

Procedural History

On November 4, 2010, a jury convicted Mr. Masalmani of eighteen total charges in three consolidated cases, including one count of felony murder. (Appendix, 30a). The trial court sentenced Mr. Masalmani to a prison term of life without the possibility of parole (“LWOP”) for the murder conviction. (*Id.*). At the time of sentencing, this sentence was mandatory, MCL 750.316(1); MCL 791.234(6)(a), even though Mr. Masalmani was 17 years old at the time of his offense.

Mr. Masalmani’s convictions were not final for the purposes of appeal when *Miller v Alabama*¹ was decided. On Mr. Masalmani’s appeal by right, the Court of Appeals affirmed Mr. Masalmani’s convictions, but vacated the mandatory LWOP sentence and remanded the case to the trial court for a resentencing pursuant to *Miller*. (Appendix, 31a-37a).

In late-2014, the trial court held a *Miller* hearing pursuant to MCL 769.25. (Appendix, 51a-188a, 189a-286a). The defense presented testimony from witnesses who knew Mr. Masalmani during his childhood and teenage years and from expert witnesses in adolescent brain development, psychology, and Michigan’s foster care system. (Appendix, 51a-188a, 189a-286a). The court received hundreds of pages of records into evidence and considered Mr. Masalmani’s sentencing memorandum, including a social worker report. (Appendix, 362a-363a).

On January 6, 2015, the trial court resentenced Mr. Masalmani to a prison term of life without the possibility of parole. (Appendix, 358a). Among other things, the trial court concluded:

¹ *Miller v Alabama*, 567 US 460, 132 S Ct 2455 (2012).

- “There was nothing in the testimony or evidence presented which suggests that treating defendant differently from an 18 year old (sic) would be warranted in this case. Upon careful consideration, the Court finds that this factor favors imposing a sentence of life without the possibility of parole.” (Appendix, 365a).
- “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.” (Appendix, 369a).
- [T]he 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. (*Id.*).

Mr. Masalmani appealed his life without parole sentence by right. (Appendix, 25a). He asserted that his life without parole sentence was invalid because the trial court made a number of legal errors when analyzing the *Miller* factors and imposing its sentence.

On September 22, 2016, the Court of Appeals affirmed Mr. Masalmani’s sentence in an unpublished per curiam opinion. (Appendix, 380a-387a).

On November 17, 2016, Mr. Masalmani sought leave to appeal to this Honorable Court. (Appendix, 28a-29a). On April 5, 2019, this Court granted Mr. Masalmani’s Application for Leave to Appeal, in part. (Appendix, 389a). This Court granted the application “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.” (*Id.*). It ordered the parties to address the following questions:

- (1) which party, if any, bears the burden of proof of showing that a *Miller* factor does or does not suggest a LWOP sentence;

(2) 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; and

(3) whether the 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.

(Id.).

Argument

- I. The government must bear the burden of proof at a *Miller* hearing, consistent with juveniles' state and federal constitutional rights to due process and to be free from cruel and/or unusual punishment.²**

Standards of Review

Constitutional questions and questions of law are reviewed de novo. *People v Carp*, 496 Mich 440, 460; 852 NW2d 801 (2014), overruled on other grounds in *Montgomery v Louisiana*, __ US __; 136 S Ct 718, 732 (2016) (citations omitted).

Background

The United States Supreme Court held that children are fundamentally different from adults in ways that mitigate their culpability. *Miller v Alabama*, 567 US 460; 132 S Ct 2455 (2012). Because children are less culpable for their actions and more capable of change, it is cruel and unusual to impose the harshest penalties on children, even when they commit heinous crimes. *Graham v Florida*, 560 US 48, 68-69, 71; 130 S Ct 2011 (2010). As a result, in *Miller*, the Court barred mandatory life without parole sentences for all juveniles under the age of 18. *Miller*, 567 US at 470. And in 2016, in *Montgomery*, the Court held that *Miller* applied retroactively to those whose convictions were already final when it was decided.

Montgomery, 136 S Ct 736. The *Montgomery* Court explained:

Miller, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth. Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth

² This issue is framed differently than the issues raised in Mr. Masalmani's Application for Leave to Appeal because it is intended to provide a direct answer to the broad legal question asked by the Court in its order granting leave.

Amendment for a child whose crime reflects unfortunate yet transient immaturity.

Montgomery, 136 S Ct at 734.

The United States Supreme Court established two categories of juveniles convicted of murder: (1) the “vast majority” for whom a life without parole sentence is unconstitutional and (2) the “rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified.” *Montgomery*, 136 S Ct at 733-34.

In response to *Miller*, Michigan’s legislature passed MCL 769.25 and MCL 769.25a in an attempt to bring the state’s juvenile sentencing laws into compliance with the Eighth Amendment’s prohibition against cruel and unusual punishment. MCL 769.25 and MCL 769.25a gave prosecutors the ability to seek or re-seek a life without parole sentence for juveniles by filing a motion within the time allowed by the statutes. MCL 769.25(3); MCL 769.25a(4)(b). If the prosecutor does not file such a motion, then the default sentence for juveniles convicted of first-degree murder is a term of years. *People v Skinner*, 502 Mich 89, 102-103; 917 NW2d 292 (2018), citing *Carp*, 496 Mich at 440.

Only if the prosecution files a motion seeking a life without parole sentence does it become necessary for the trial court to hold a *Miller* hearing, at which it must consider each of the *Miller* factors. MCL 769.25(6); MCL 769.25a(4)(b). This Court has held that the *Miller* factors can only be considered for their mitigating affect, not as aggravators. *Skinner*, 502 Mich at 114-116.

The key question to be answered by the sentencer following a *Miller* hearing is “whether [the juvenile’s] crimes reflected ‘transient immaturity’ or ‘irreparable corruption.’” *Adams v Alabama*, __ US __; 136 S Ct 1796, 1799-1800 (2016) (Sotomayor, J., concurring in

the decision to grant, vacate, and remand cases of juveniles serving life without parole) (joined by Ginsburg, J.) (noting that *Miller* not only requires the sentence to answer this question, “but to answer correctly”).

By filing a motion seeking a life without parole sentence in a particular case, the prosecution is necessarily alleging that the juvenile is one of the “rare” juveniles “who exhibits such irretrievable depravity that rehabilitation is impossible...” *Montgomery*, 136 S Ct at 733-34. The United States Supreme Court’s “repeated exhortation that the gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption” highlights that more than the facts of the offense must be established for a life without parole sentence to be constitutional. *Adams*, 136 S Ct at 1800 (Sotomayor, J., concurring). This Court recently acknowledged this: “courts are not allowed to sentence juveniles who are not irreparably corrupt to life without parole.” *Skinner*, 502 Mich at 125; See also US Const, Am VIII; Const 1963, art 1, § 16.

Discussion

A *Miller* hearing is required whenever the government chooses to seek a life without parole sentence for a juvenile. MCL 769.25(6). As an actor on behalf of the government and the moving party, the prosecution should bear the burden of proving beyond a reasonable doubt that the juvenile is irreparably corrupt. This rule is consistent with our state’s general practices regarding the allocation of burden in motion practice. It is also consistent with a juvenile’s state and federal constitutional rights and public policy. Further, the majority of the states that have considered this question agree that the government must bear the burden of proof beyond a reasonable doubt at a *Miller* hearing.

This Court need not overrule any existing authorities in order to hold that the prosecution bears the burden of proof at a *Miller* hearing, as that rule is consistent with MCL 769.25, MCL 769.25a, and our state’s jurisprudence.

A. The moving party traditionally bears the burden of supporting its request; the government traditionally bears the burden of proof in criminal proceedings.

Generally, in the civil and criminal context, the moving party carries the burden of proof³ related to its request and the “plaintiff has always the burden of showing his cause of action.” *Caruso v Weber*, 257 Mich 333, 334; 241 NW 198 (1931). In the context of *Miller* hearings, the prosecution is the moving party. There is no reason to deviate from the general rule that the moving party bears the burden in proceedings under *Miller*. If anything, consideration of a juvenile’s rights to due process and public policy counsel in favor of adhering to this rule.

Michigan’s longstanding practice requires that the moving party bear the burden of proof in most contexts. See *People v Van Camp*, 356 Mich 593, 602–03 (1959) (holding that the burden was on the movant of a motion in a criminal proceeding). For example, if the prosecution moves to admit other acts evidence in a criminal trial, the prosecution bears the burden of establishing the relevance of that evidence. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). The prosecution also bears the burden of establishing that the evidence is admissible for a proper purpose. *People v Denson*, 500 Mich 385, 399; 902 NW2d 306 (2017).

³ The term “burden of proof” encompasses both a burden of “producing evidence, satisfactory to the judge, of a particular fact in issue” and a burden of “persuading the trier of fact that the alleged fact is true.” 2 McCormick on Evid § 336 (7th ed).

In another example, a defendant who files a motion for new trial bears the burden of showing he or she is entitled to relief.⁴ E.g. *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008) (burden is on defendant seeking new trial to establish that a juror was not impartial). In the context of a discovery motion, the moving party also has the burden of showing necessity. *People v Maranian*, 359 Mich 361, 368; 102 NW2d 568 (1960).

Relevant to the issue in this case, when the government seeks to prosecute juveniles for certain offenses through Michigan's traditional waiver process, the prosecution bears the burden of establishing that the best interests of the juvenile and the public would be served by waiver. MCR 3.950(D)(1)(b). The prosecution also bears the burden of proof when seeking designation, MCR 3.952(C)(2), and in several other stages of juvenile proceedings, MCR 3.955(B); MCR 3.965(A)(4)(a); MCR 6.937(A)(4). In the context of criminal sentencing, the prosecution bears the burden of establishing challenged facts in the presentence report are accurate and bears the burden of establishing facts it wishes to rely on as aggravators. E.g. *People v Norfleet*, 317 Mich App 649, 669; 897 NW2d 195 (2016).

As a matter of federal constitutional law, where the government seeks to introduce inculpatory evidence obtained by a waiver or violation of a defendant's constitutional rights, the government bears the burden of proving the evidence was obtained lawfully. E.g. *Colorado v Connelly*, 479 US 157, 168-169; 107 S Ct 515 (1986) (waiver of *Miranda* rights); *United States v Matlock*, 415 US 167, 177-178 n 14; 94 S Ct 988 (voluntariness of consent to

⁴ In some situations, most frequently where a defendant seeks to present an affirmative defense, the defense as the moving party bears an initial burden. E.g. MCL 768.20 (requiring the defense to make a showing of certain details before it can present an alibi defense). Once met, the burden shifts to the prosecution to disprove the affirmative defense beyond a reasonable doubt. E.g. *People v Burden*, 395 Mich 462, 467; 236 NW2d 505 (1975) (noting the prosecution bears the burden of disproving defendant's alibi and that the jury should be so instructed).

search). In the context of a motion for a pretrial gag order, the moving party bears a “heavy burden” in demonstrating the necessity of the order to ensure a fair trial. *Nebraska Press Ass’n v Stuart*, 427 US 539, 558; 96 S Ct 2791 (1976).

In proceedings pursuant to *Miller* and MCL 769.25 and MCL 769.25a, the government is necessarily the moving party. A juvenile defendant has no say in whether or not a *Miller* hearing will occur, as the government is the sole decision-maker about whether to seek a LWOP sentence for a juvenile. Once the government decides to seek a LWOP sentence, it must file a motion that specifies “the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole.” MCL 769.25(3). Under these circumstances, and consistent with longstanding practices, the prosecution should carry the burden of proving those grounds at the subsequent hearing.

B. The majority of jurisdictions that have considered this question have concluded that the prosecution bears the burden of proof at a *Miller* hearing.

Mr. Masalmani’s position that the government bears the burden of proof at a *Miller* hearing is the majority rule in the states that have considered the question.

There are approximately 23 states remaining that both authorize and actually impose LWOP for juveniles convicted of homicide.⁵ Not all of these states have addressed the

⁵ See *States that Ban Life Without Parole for Children*, The Campaign for the Fair Sentencing of Youth, available at <https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/> (accessed 8/29/2019). Over half of all states and the District of Columbia no longer impose life without parole sentences on children in any circumstance. *Id.* And the United States is alone on the global stage in imposing life without parole sentences on children. Connie De La Vega, et al, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, 58 (2012) available at <https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf> (accessed 8/30/2019).

question of which party bears the burden of proof at a *Miller* hearing. Among the states that have addressed the question, there is a split, with a majority determining that the prosecution bears the burden. Of the 10 state high courts that have decided the issue, seven have found that the burden at a *Miller* hearing properly rests with the government:

- Indiana: The Indiana Supreme Court held that the government bears the burden of proof at a *Miller* hearing. *Conley v State*, 972 NE2d 864, 871 (Ind 2012). The state’s statute treats LWOP in substantially the same way as it does the death penalty. See Ind Code § 35-50-2-9. “The penalty phase of an LWOP trial requires introduction of evidence with the burden on the State to prove its case beyond a reasonable doubt.” *Conley*, 972 NE2d at 871.
- Iowa: The Iowa Supreme Court initially held that the “burden was on the state to show that an individual offender manifested ‘irreparable corruption.’” *State v Seats*, 865 NW2d 545, 556 (Iowa 2015) (quotation omitted). It subsequently held that a sentence of LWOP was categorically barred for juveniles as a matter of state law. See *State v Sweet*, 879 NW2d 811 (Iowa 2016).
- Missouri: The Missouri Supreme Court, sitting *en banc*, held that “a juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances.” *State v Hart*, 404 SW3d 232, 241 (Mo 2013) (*en banc*).
- Oklahoma: The Court of Criminal Appeals of Oklahoma held that “[i]t is the State’s burden to prove, beyond a reasonable doubt, that the defendant is irreparably corrupt and permanently incorrigible.” *Stevens v State*, 422 P3d 741, 750 (Okla Crim App 2018).
- Pennsylvania: The Pennsylvania Supreme Court held that “the Commonwealth must prove that the juvenile is constitutionally eligible for [LWOP] beyond a reasonable doubt.” *Commonwealth v Batts*, 640 Pa 401, 476-477; 163 A3d 410 (2017).
- Utah: The Utah Supreme Court held that the burden is on the government to show that a juvenile defendant should receive LWOP. *State v Houston*, 353 P3d 55, 69-70; 781 Utah Adv Rep 33 (Utah 2015). This decision was based on a Utah statute that places the burden on the government to demonstrate that LWOP is appropriate. Utah Code § 76-3-207(5)(c) (2008).

- Wyoming: The Wyoming Supreme Court held that the government bears the burden of proving beyond a reasonable doubt that a juvenile “is irreparably corrupt, in other words, beyond the possibility of rehabilitation.” *Davis v State*, 415 P3d 666, 682; 2018 WY 40 (2018).

Some of these states concluded that “any suggestion of placing the burden on the juvenile offender is belied by the central premise of *Roper*, *Graham*, *Miller* and *Montgomery* - that as a matter of law, juveniles are categorically less culpable than adults.” *E.g. Davis*, 415 P3d at 681; *Batts*, 640 Pa at 471. In other words, their conclusion that the government bears the burden is based on the central holdings of *Miller* and *Montgomery*.

Some states also recognized that the burden of proof at a *Miller* hearing implicates due process concerns and applied the four-part balancing test established in *Mathews v Eldridge*, 424 US 319, 334-335; 96 S Ct 893 (1976). *E.g. Davis*, 415 P3d at 682; *Batts*, 640 Pa at 475. Ultimately, states have concluded, as this Court should, that “the risk of an erroneous decision against the juvenile results in the irrevocable loss of that liberty for the rest of his life,” *Id.* (cleaned up), while the risk of an erroneous decision in favor of the juvenile presents a much lesser risk. *Id.*

- 1. The majority rule is better grounded in constitutional and policy concerns than the decisions of the minority of states which have found the defense bears the burden at a *Miller* hearing.**

As discussed above, a majority of the states that have considered this issue have determined that the government bears the burden of proving a juvenile defendant is irreparably corrupt at a *Miller* hearing. Their decisions are grounded in a juvenile’s Eighth Amendment rights, as discussed in *Miller* and *Montgomery*, as well as a juvenile’s due process rights and public policy considerations.

While two states currently apply a rule that the defense bears the burden at a *Miller* hearing, their reasoning is inconsistent and, at times, inapplicable in Michigan because of variations in state law:

- Mississippi: The Mississippi Supreme Court held that LWOP may be imposed constitutionally “to juveniles who fail to convince the sentencing authority that *Miller* considerations are sufficient to prohibit [it].” *Jones v State*, 122 So3d 698, 702 (2013). This assertion was made in the context of reviewing a constitutional challenge to the state’s statute allowing for the imposition of LWOP. This language has been interpreted by the Mississippi Court of Appeals to mean that there is no presumption against LWOP and the burden is on the defense “to persuade the judge that he is entitled to relief under *Miller*.” *Cook v State*, 242 So3d 865, 873 (2017).
- Arizona: The Arizona Supreme Court held that the burden is on juvenile defendants “to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity.” *State v Valencia*, 241 Ariz 206, 210; 386 P3d 392 (2016), citing Ariz R Crim P 32.8. The rule cited is a state rule of criminal procedure that places the burden of proving factual allegations by a preponderance of the evidence in state post-conviction proceedings. The Court also noted but did not discuss language in *Montgomery* requiring that juvenile defendants “be given the opportunity to show that their crime did not reflect irreparable corruption.” See *Montgomery*, 136 S Ct at 736-737.

The Washington Supreme Court held the burden of proof lies with the defense based on state law establishing that “the offender carries the burden of proving that an exceptional sentence below the standard range is justified.” *State v Ramos*, 187 Wash 2d 420, 445-446; 387 P3d 650 (2017). However, the Washington Supreme Court subsequently abolished LWOP sentences for all juveniles on state constitutional grounds. *State v Bassett*, 192 Wash2d 67; 428 P3d 343 (2018).

While the Alabama Supreme Court has not yet decided this issue, an intermediate appellate court rejected a juvenile’s argument that the government bears the burden of proof at a *Miller* hearing. *Wilkerson v State*, __ So3d __; 2018 WL 6010590 (Ala Crim App 2018). Its decision relied heavily on the legislature’s determination that the procedures of a *Miller* hearing are governed by the normal procedures applicable for sentencing in the state, which

established a burden of a preponderance of the evidence and provided that both parties may present evidence. *Id.* at *10. In addition, it found persuasive those authorities from other states rejecting the argument that *Miller* established a presumption against LWOP for juveniles. *Id.* at *10-14.

Three of these four decisions relied in part or in whole on state statutes or authorities that explicitly place the burden on the defense. See *Valencia*, 241 Ariz at 210, citing Ariz R Crim P 32.8; *Ramos*, 187 Wash 2d at 445-446; *Wilkerson*, 2018 WL 6010590, *10. In Michigan there is no statutory language establishing that the defense should carry the burden at a *Miller* hearing. To the contrary, our longstanding practices regarding burdens and the language of MCL 769.25 and MCL 769.25a show that the government bears the burden of proof. See Section (I)(B), *supra*.

The majority of states applying a due process analysis found that the burden rests with the government on due process grounds, in light of the seriousness of the constitutional rights at stake. E.g. *Batts*, 640 PA at 475-477. The majority rule also comports with resource and policy considerations. The government is in the better position to shoulder the burden due to the resources⁶ it has available and because of the government's critical role in choosing whether to seek an LWOP sentence in the first place. At least one court pointed out that the government can further alleviate the resource cost of these hearings by carefully screening cases and only seeking LWOP where it is appropriate. *Id.* The government is in the best position resource-wise to bear that burden and do that screening.

⁶ Prosecutors have more resources and staff with which to prepare for and litigate *Miller* hearings than the juveniles, many of whom, especially those who have spent considerable time in prison already, are indigent and therefore must rely on appointed counsel and request the funding for the necessary experts from the courts.

This reasoning is particularly applicable in Michigan where there were approximately 363 juvenile lifers eligible for resentencing under *Montgomery* and MCL 769.25a, and where the government is seeking to reimpose LWOP in over 200 of those cases.⁷ Prosecutors in Michigan seek LWOP in a higher percentage of cases than in many other states with some prosecutors refusing to negotiate term-of-year sentences for any of the cases and some others only negotiating a few.⁸ If the government has asserted that so many juveniles are the “rare” exception to the rule, *Miller*, 567 US at 479-480, then it should bear the burden of proving that claim.

C. The circumstances of a *Miller* hearing and a juvenile’s due process rights require that the prosecution bear the burden of proving that a sentence of life without parole is appropriate.

The allocation of burden is not a mere formality. Rather, it is a critical factor controlling the structure of court proceedings, a tool for ensuring fairness, and one that implicates due process and fundamental fairness considerations in criminal cases.

In criminal proceedings, “[t]he consequences to the life, liberty, and good name of the accused from an erroneous conviction of a crime are usually more serious than the effects of an erroneous judgment in a civil case.” 2 McCormick on Evid § 341 (7th ed). As a result, the United States Supreme Court has recognized that due process protects the accused from

⁷ The Associated Press, *50-State Examination*, The Associated Press (Jul 31, 2017). Available at <https://www.ap.org/explore/locked-up-for-life/50-states> (accessed 9/6/2019). These high numbers mean Michigan is among the minority of states.

⁸ Allison Gross, *More than Half of Michigan Juvenile Lifers Still Wait for Resentencing*, The Detroit Free Press (Aug 16, 2019). Available at <https://www.freep.com/in-depth/news/local/michigan/2019/08/15/juvenile-lifers-michigan/1370127001/> (accessed 9/6/2019).

being convicted in the absence of proof beyond a reasonable doubt. *In re Winship*, 397 US 358, 364; 90 S Ct 1068 (1970).

In general, “[w]here one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden ... of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.” *Speiser v Randall*, 357 US 513, 525-526; 78 S Ct 1332 (1958). And while the present issue involves the imposition of a sentence, rather than a finding of guilt, a criminal defendant’s due process rights extend beyond trial and through sentencing. E.g. *Betterman v Montana*, __ US __; 136 S Ct 1609, 1617 (2016) (“After conviction, a defendant’s due process right to liberty, while diminished, is still present. He retains an interest in a sentencing proceeding that is fundamentally fair.”); see also, US Const, Am XIV; Const 1963, art 1, § 17.

Much like other states that have considered this issue, this Court should apply the *Mathews* balancing test and conclude that due process requires the prosecution to bear the burden of proof at a *Miller* hearing. Under *Mathews*:

- (1) the private interest is one of our most treasured – liberty;
- (2) the risk of the erroneous deprivation of liberty (i.e. an unconstitutional LWOP sentence for a juvenile who is not irreparably corrupt) is significantly greater if defendants are required to carry the burden at *Miller* hearings;
- (3) the risk of an erroneous deprivation of liberty is significantly lesser if the government bears the burden; and
- (4) the government has no interest in winning for the sake of winning, but rather has an interest in doing justice (i.e. obtaining accurate and constitutional sentences) which is served where the government bears the burden [see *Berger v United States*, 295 US 78, 88; 55 S Ct 629 (1935) (noting that the government’s interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done.”)].

C.f. *Mathews*, 424 US at 334-335. Each of the factors suggests that allocating the burden of proof at a *Miller* hearing to the government is necessary as a matter of due process and will serve to ensure that *Miller* hearings are fundamentally fair and result in accurate, constitutional sentences.

D. The prosecution bearing the burden of proof at a *Miller* hearing is not foreclosed by this Court's decision in *People v Skinner*.

In *People v Skinner*, this Court held there was no presumption against a life without parole sentence for a juvenile, but the Court left open the question of who bears the burden at a *Miller* hearing. *Skinner*, 502 Mich at 131. The majority noted, “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.” *Skinner*, 502 Mich at 131, citing *Montgomery*, 136 S Ct at 736 (“Prisoners must be given the opportunity to show their crime did not reflect irreparable corruption.”) (cleaned up). This language is not part of the central holding in *Skinner*, nor was the *Skinner* Court concerned with the burden question. As such the suggestion is obiter dictum and is not controlling. See *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985) (it is a “well-settled rule” that “statements concerning a principle of law not essential to the determination of the case are obiter dictum and lack the force of an adjudication”) (citations omitted).

The conclusion that the defense bears the burden at a *Miller* hearing does not follow from the language in the *Montgomery* decision relied upon to support it. In *Montgomery*, the United States Supreme Court stated, “prisoners like *Montgomery* must be given the opportunity to show their crime did not reflect irreparable corruption” in a concluding

paragraph of an opinion concerned only with the question of whether *Miller* would apply retroactively to those juvenile defendants whose convictions were final when the Court decided *Miller*. *Montgomery*, 136 S Ct at 725, 736. The context in which this language appears means that it too is obiter dictum. C.f. *Roberts*, 422 Mich at 597-598. The fact that defendants must have the opportunity to present certain evidence (a right defendants have at trial as well) does not mean that defendants must bear the burden of proof. The majority of states that have considered this issue agree. E.g. *Hart*, 404 SW3d at 241 (recognizing that the United States Supreme Court left the burden question unanswered in its decisions in *Miller* and *Montgomery*).

E. Alternatively, this Court should overrule its decision in *Skinner* and hold that there is a presumption against LWOP sentences for juveniles.

Mr. Masalmani respectfully asserts⁹ that this Court erred in determining that “neither *Miller* nor *Montgomery* imposes a presumption *against* life without parole.” *Skinner*, 502 Mich at 131. In order to protect Mr. Masalmani’s constitutional rights to due process and a proportionate sentence, this Court should recognize that there is a presumption against a life without parole sentence for juveniles convicted of first-degree murder. This is consistent with *Miller* and *Montgomery*, as acknowledged by the dissent in *Skinner*. *Id.* at 150 (McCormack, J, dissenting) (“a faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole”) (citations omitted).

⁹ In making this assertion, Mr. Masalmani is mindful of this Court’s general preference for adherence to the doctrine of stare decisis. *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000). However, he makes this argument in good faith reliance on federal law and the decisions of other jurisdictions that have considered this question. He also makes this argument in order to preserve the issue.

A presumption against life without parole sentences for juveniles was established in *Miller* and *Montgomery*, as has been recognized by the following state courts:

- California: A presumption in favor of life without parole would be “in serious tension with *Miller’s* categorical reasoning about the differences between juveniles and adults.” *People v Gutierrez*, 58 Cal 4th 1354, 1380; 324 P3d 245 (2014).
- Connecticut: The language in *Miller* “suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender.” *State v Riley*, 315 Conn 637, 655; 110 A3d 1205 (2015).
- Iowa: “First, the court must start with the Supreme Court’s pronouncement that sentencing a juvenile to life in prison without the possibility of parole should be rare and uncommon. Thus, the presumption for any sentencing judge is that the judge should sentence juveniles to life in prison with the possibility of parole for murder unless the other factors require a different sentence.” *Seats*, 865 NW2d at 555. “[T]he judge must make specific findings of fact discussing why the record rebuts the presumption.” *Id.* at 557.
- Pennsylvania: “[T]he central premise of *Roper*, *Graham*, *Miller* and *Montgomery* – that as a matter of law, juveniles are categorically less culpable than adults....[necessitates that] a faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole.” *Batts*, 640 Pa at 471-472.
- Wyoming: “A sentencing court must begin its analysis with the premise that in all but the rarest of circumstances, a life-without-parole (or the functional equivalent thereof) sentence will most likely be disproportionate to the juvenile.” *Davis*, 415 P3d at 681.

The United States Supreme Court’s repeated insistence that a life without parole sentence can only be imposed on “very rare” juveniles or in “exceptional circumstances” is tantamount to a presumption against such a sentence. Mr. Masalmani’s *Miller* hearing should have begun with that presumption in order to protect his constitutional rights. See *Tatum v Arizona*, __ US __; 137 S Ct 11, 12-13 (2016) (Sotomayor, J. concurring); *Montgomery*, 467 US 460; *Adams*, 136 S Ct at 1800 (Sotomayor, J., concurring).

II. The trial court committed reversible error in its consideration of the *Miller* factors by treating them as aggravators, and it committed reversible error because it did not provide Mr. Masalmani with individualized sentencing, in violation of his state and federal rights to be free from cruel and/or unusual punishment.

Standards of Review

Sentencing decisions are reviewed for an abuse of discretion. A sentence can be said to constitute an abuse of discretion if the sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Skinner*, 502 Mich 89, 131-132; 917 NW2d 292 (2018). Also, “[a] trial court necessarily abuses its discretion when it makes an error of law.” *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

To the extent the sentence of life without parole for offenses committed as a juvenile implicates Mr. Masalmani’s Eighth Amendment and due process rights, a de novo review is appropriate. See, generally, *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

With regard to the trial court’s findings of fact, “the standard of review requires an appellate court to accept the trial court’s findings of fact unless they are clearly erroneous.” *People v Reese*, 491 Mich 127, 159; 815 NW2d 85 (2012).

Issue Preservation

In the trial court, Mr. Masalmani asserted that the *Miller* factors could only be considered for their mitigating effect and that *Miller* required the sentencing court to impose an individualized sentence. (Appendix, 309a-301a).

Introduction

Regardless of the Court's decision on which party bears the burden of proof, Mr. Masalmani's case should be reversed and remanded for a new sentencing hearing due to the errors of law made by the trial court.

The trial court did not properly consider the *Miller* factors as mitigating, but instead considered them as aggravating (weighing against) a term of years sentence for Mr. Masalmani. The trial court's consideration of Mr. Masalmani ignored the neuroscience and the testimony relating to Mr. Masalmani's actual level of maturity relative to other juveniles his age. The trial court did not properly consider Mr. Masalmani's family and home environment, when it used those facts in conjunction with perceived deficiencies in the Department of Corrections to sentence Mr. Masalmani to life without the possibility of parole. Finally, the trial court's consideration of Mr. Masalmani's youth was not individualized as required by *Miller* and the preceding body of case law.

Discussion.

Miller v Alabama drew together two strands of Supreme Court jurisprudence to conclude that mandatory life without parole for juveniles violated the Eighth Amendment's prohibition on cruel and unusual punishment. *Miller*, 567 US at 469-78. In so doing, the *Miller* Court cautioned that "[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest penalty will be uncommon." *Id.* at 479 (cleaned up).

In rejecting mandatory life without parole sentences for juveniles, the *Miller* Court said the following factors must be considered in determining whether a juvenile should be sentenced to die in prison:

(1) chronological age and its hallmark features, among them immaturity, impetuosity, and failure to appreciate risks and consequences;

(2) the family and home environment that surrounds the juvenile—and from which the juvenile cannot usually extricate himself—no matter how brutal or dysfunctional that environment may be;

(3) the circumstances of the homicide offense, including the extent of the juvenile’s participation in the conduct and the way familial and peer pressures may have affected the juvenile;

(4) whether the juvenile might have been charged and convicted of a lesser offense if not for incompetencies associated with youth, such as inability to deal with police officers, prosecutors and/or incapacity to assist his own attorneys; and

(5) the possibility of rehabilitation.

Id. at 477–78.

An understanding of the breadth of mitigating evidence, and how mitigation is defined is crucial to analyzing Mr. Masalmani’s case. “Mitigation” is not limited to a rationale for a defendant’s conduct in committing a crime. Instead, the Supreme Court of the United States has long provided a much broader definition and role for mitigating evidence. In *Lockett v Ohio*, 438 US 586; 98 S Ct 2954 (1978) (plurality opinion), the Court held that the sentencer in a capital case must be given a full opportunity to consider, as a mitigating factor, “any aspect of a defendant’s character or record,” in addition to “any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Id.* at 603–605. The Court emphasized the “need for treating each defendant in a capital case with that

degree of respect due the uniqueness of the individual.” The Court recognized that justice requires not only taking into account the circumstances of the offense, but also the character and propensities of the offender. *Eddings v Oklahoma*, 455 US 104, 112; 102 S Ct 869 (1982). The same is true of Michigan’s jurisprudence. See *People v Chapa*, 407 Mich 309; 284 NW 2d 340 (1979).

The Court has consistently rejected attempts to limit evidence that defendants wish to offer as mitigating. In *Smith v Texas*, 543 US 37, 125 S Ct 400 (2004) (per curiam), the Court rejected any notion of “nexus” being required between the defendant’s troubled childhood and limited mental abilities and reiterated that the only relevant question was whether the mitigating evidence would give a jury reason to impose a sentence other than death. *Id.* at 43-45.

Finally, “the sentence imposed at the penalty stage ... should reflect a reasoned moral response to the defendant's background, character, and crime.” *Abdul-Kabir v Quarterman*, 550 US 233, 252; 127 S Ct 1654 (2007)(cleaned up) (citations omitted).

A. The trial court’s consideration of chronological age and its hallmark features was error; chronological age and its hallmark feature must be assessed for their mitigating effect

Youth is mitigating, not aggravating. The Supreme Court of the United States recognizes that anyone under the age of 18 receives the benefit of having the mitigating qualities of youth considered before a court can consider imposing a sentence of LWOP. *Miller* established that “...a judge or jury must have the opportunity to consider **mitigating** circumstances before imposing the harshest possible penalty for juveniles.” *Miller*, 567 US at 489 (emphasis added). Thus, each of the *Miller* factors must be considered for its mitigating

effect. *Id.* at 476-478. This Court also recognized that the chronological age of the juvenile is a mitigating factor. *People v Skinner*, 502 Mich 89, 120; 917 NW2d 292 (2018).

This concept is not new. In *Eddings*, the United States Supreme Court examined the case of a 16-year-old who shot a police officer to death at point-blank range. *Eddings*, 455 US 104. In reversing his death sentence, the Court held: “[T]he chronological age of a minor is itself a relevant mitigating factor of great weight...” in assessing culpability. *Id.* at 116. As *Roper* and *Graham* emphasize, it is the distinctive attributes of youth that diminish penological justifications for sentencing juveniles. *Graham v Florida*, 560 US 48, 70-72; 130 S Ct 2011 (2010); *Roper v Simmons*, 543 US 551, 571-572; 125 S Ct 1183 (2005). When a person is a minor, their age is mitigating. The United States Supreme Court has repeatedly said so, and this Court has said so as well.

States recognize that *Miller* sets forth the mitigating qualities of youth. E.g., *Connecticut v Rile*, 315 Conn 637, 661; 110 A3d 1205 (2015) (“...the record does not clearly reflect that the court considered and gave mitigating weight to the [17-year-old] defendant’s youth and its hallmark features...”); *Steilman v Montana*, 389 Mont 512, 519; 407 P3d 313 (2017) (recognizing that *Miller’s* substantive rule requires Montana judges to “...adequately consider the mitigating characteristics of youth set forth in the *Miller* factors...”); *Aiken v Byars*, 410 SC 534, 544-554; 765 SE2d 572 (2014) (recognizing that the *Miller* factors are in addition to other types of mitigating evidence of the type permitted in death penalty cases, and specifically recognizing the individualized nature of the sentencing process); and *Landrum v State*, 192 So 3d 459, 469 (Fla, 2016) (“*Miller* and *Montgomery*, together with *Roper* and *Graham*, **require a sentencer to consider age-related evidence as mitigation**, and permit the sentencing of a juvenile offender to life imprisonment only in the most

uncommon and rare case where the juvenile offender's crime reflects irreparable corruption.”) (quotations and citation omitted) (emphasis added).

But in Mr. Masalmani’s case, the sentencing court improperly used his age, or rather his proximity to his 18th birthday, to aggravate his sentence to life without the possibility of parole. The trial court did this despite uncontroverted testimony that Mr. Masalmani was a child who needed “constant direction;” a child who was noted to be “not very mature compared to the general population;” and who became “further and further behind” in his education. (Appendix, 159a-160a).

The trial court’s ruling on “chronological age and its hallmark features” are found on pages 3-4 of the trial court opinion. (Appendix, 364a-365a). Despite a cursory acknowledgement of Dr. Keating’s testimony, the trial court used Mr. Masalmani’s age as an aggravating factor. The court said:

Had he committed his offense four months later, life without parole would be mandatory and resentencing would be impermissible...*Miller* dealt with juvenile defendants who were a mere 14 years old at the time of their offenses—a far cry from this case. Defendant was only 4 months away from being an adult.

(*Id.*). Confusingly, the trial court added:

Moreover, while the testimony established that the prefrontal cortex continues to develop into one’s mid-twenties, the Court is not free to take this developmental disconnect into consideration when a criminal defendant is over 18. To the contrary, the Court is *required* to impose mandatory life without parole for defendants who are only 4 months older than defendant was when he committed his crimes. There was nothing in the testimony or evidence presented which suggests treating defendant differently from an 18-year-old would be warranted in this case.

(Appendix, 365a) (emphasis in original).

This analysis runs contrary to *Miller* and the science underpinning it. Ongoing research indicates that the immaturity, impetuosity, susceptibility to peer influence, and greater capacity for rehabilitation—the hallmark features of youth—are retained well into an individual’s twenties.¹⁰ In the last decade, studies on brain maturation confirmed that the aspect of brain development affecting judgment and decision-making do not end when a person turns 18. Neurodevelopmental growth continues into the mid- to late-twenties. See Beaulieu & Lebel, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 27 *J Neuroscience* 31 (2011); Pfefferbaum, *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women*, 65 *Neuro Image* 176, 176-193 (2013). One longitudinal study that tracked brain development of 5,000 children demonstrated that their brains were not fully mature until at least 25 years of age. Dosenbach, *Prediction of Individual Brain Maturity Using MRI*, 329 *Sci* 1358, 1358-1359 (2010).

The part of the brain that causes adolescents to be sensation-seeking and reward seeking kicks into high gear at puberty. But the part of the brain responsible for self-control, regulating impulses, thinking ahead, evaluating the consequences of a risky act, and resisting peer pressure is still undergoing dramatic change well into the mid-twenties. E.g., Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty*, 40 *NYU Rev L & Soc Change* 139, 163 (2016) (citing research that found antisocial peer pressure was a highly significant predictor of reckless behavior in emerging adults 18 to 25); and Weingard, *Effects of Anonymous Peer Observation in Adolescents’ Preference for Immediate*

¹⁰ And in fact, Mr. Masalmani was only 22 years old at the time of the *Miller* hearing.

Rewards, 17 Dev Sci 71 (2013) (finding that a propensity for risky behaviors exists into early adulthood past age 18, because of a young adult's "still maturing cognitive control system").

In sum, a large body of scientific research confirms that the hallmark characteristics of youth continue far later than age 18, and at least through the age of 21, if not beyond. While it is unfortunate that those aged 18 do not get the benefit of the bright line rule of *Miller*, that fact is of no significance to Mr. Masalmani. The neuroscience underpinning *Miller* did apply to him, and the trial court did not give proper consideration to his chronological age and its hallmark features.

The trial court did not have to see into the future to understand what research continues to demonstrate. Dr. Daniel Keating was questioned at the *Miller* hearing regarding the bright-line age cut-off in *Miller* and he said, "I think it's a legal bright-line not particularly well-based in science. Presumably there were reasons to draw that line but...if one were drawing the line on the basis of the existing evidence at this point in time...one would not choose the age of 18." He went on to say, "It's a continuum, but I would think that the scientific consensus now would place that age somewhere in the mid-20s...Certainly not 18." (Appendix, 68a).

Dr. Keating's testimony regarding the activation of the limbic system in adolescents is telling:

[W]e have a huge rebirth of these synapses...Among them are a whole set of a search of dopamine receptors...[T]he dopamine system is the thing that signals to our body that was a good thing...[I]t's not a system that discriminates between good pleasure givers and bad pleasure givers...So basically what you're talking about here then is a level of activity and receptivity of the limbic...this is higher during early to mid-going into late- adolescence that [sic] it will be at any other point of life...

(Appendix, 71a-72a).

The trial court's reliance on Mr. Masalmani's impending 18th birthday in aggravating Mr. Masalmani's sentence to life without parole is contrary to the letter of the law, the specific testimony in Mr. Masalmani's case, and the developing science underpinning the law. *Miller* established a bright line rule: "[M]andatory 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.'" *Miller*, 567 US at 465 (citations and quotations omitted). Instead of acknowledging the mitigating nature of his age and the underlying science, the trial court made the very error the United States Supreme Court warned against in *Graham*: "[A]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course..." *Graham*, 560 US at 78.

The trial court did not consider and give effect to Dr. Keating's testimony regarding how chaotic and abusive environments affect the adolescent brain. Dr. Keating testified that a child's environment will have an effect on how the brain is shaped and that "our stress response system is particularly sensitive to harsh environments." (Appendix, 81a-82a). Mr. Masalmani was not responsible for the chaotic and abusive environment in which he grew up (and from which he, a child, could not extricate himself), nor was he responsible for the lack of ability of his adolescent brain to compensate for that.

That the trial court was using age as an aggravating—not mitigating—factor becomes even more apparent when one examines the trial court's opinion and order in co-defendant Robert Taylor's case. (Appendix, 372a-379a). Mr. Taylor was sixteen years of age at the time of the crime; the trial court characterized him as "a mere 14 months shy of his 18th birthday

at the time of the offense.” The trial court went on to say, “In short, while this factor does not weigh as heavily against defendant as it did against his co-defendant, Masalmani, the Court is not convinced that this factor mitigates against a sentence of life without the possibility of parole.” (Appendix, 375a).

Being aged 17 as opposed to aged 14, as the children were in *Miller*, might be less mitigating. But under no circumstances is being aged 17 an aggravating factor, as it was used here.¹¹ Thus, the trial court erred as a matter of law when it ignored the holdings of *Miller* and *Skinner*, as those cases instructed to consider youth for its mitigating effects. On the basis of this error alone, the Court should reverse and remand for resentencing.

B. The trial court’s consideration of Mr. Masalmani’s family and home environment and its implications for the possibility of rehabilitation was error; it failed to consider these factors for their mitigating effect and relied on unsupported assumptions about the Michigan Department of Corrections

In essence, the trial court improperly conflated two distinct *Miller* factors: family and home environment and the possibility of rehabilitation. Despite the trial court recognizing that “There was essentially uncontroverted evidence that [Mr. Masalmani’s] family and home environment was terrible” and finding that factor to be mitigating, (Appendix, 365a), the trial court ultimately concluded, “[t]he very difficulty of [Mr. Masalmani’s] upbringing—the only factor which could be said to weigh in favor of an indeterminate sentence—also suggests

¹¹ *Miller’s* analysis and the mitigating qualities of youth are being extended to those 18 years of age and older. *See, for example, State v O’Dell*, 183 Wash2d 680, 691-96, 358 P3d 359 (2015); and the American Bar Association has adopted a resolution urging states with the death penalty to bar it for those under age 21, see: <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf> (accessed 9/5/2019).

that [his] prospects for rehabilitation are minimal.” (Appendix, 369a). The trial court found it “implausible that [Mr. Masalmani] will experience full rehabilitation without intensive professional assistance—assistance which he is very unlikely to receive in prison.” (*Id.*).

Again, it must be pointed out that the *Miller* factors are mitigating factors and cannot be used to aggravate Mr. Masalmani’s sentence. See Issue(II)(A), *supra*. The trial court held Mr. Masalmani’s truly terrible and tragic background against him—the very thing which *Miller* counseled against. “[Mandatory life without parole prevents [the sentencer] from taking into account the family and home environment that surrounds him...no matter how brutal or dysfunctional...” *Miller*, 567 US at 477.

Mitigating evidence is not to be used as a “two-edged sword.” Without correct application of mitigating evidence, sentencers make the error of misusing mitigating evidence and reach unjust conclusions. As the United States Supreme Court pointed out in *Atkins v Virginia*, certain vulnerable populations are at risk of being punished *more* harshly because of the very mitigating circumstances that make them less culpable. See *Atkins v Virginia*, 536 US 304, 321; 122 S Ct 2242 (2002) (addressing the propriety of imposing the death penalty on mentally retarded defendants). *Miller* is grounded in the same concern. *Miller*, 567 US at 479 (“By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.”)

Drawing from the Supreme Court’s long line of death penalty jurisprudence—from which *Miller* developed—a sentencer is to give a “reasoned moral response” after hearing a defendant’s mitigating evidence. *Abdul-Kabir*, 550 US at 255-256. Instead of a reasoned moral response, the trial court punished Mr. Masalmani for being a child who experienced

neglect, physical abuse, sexual abuse, and educational deficiencies. (Appendix, 154a-156a). This was exactly the wrong use of his mitigating evidence.

The trial court made an additional error in its analysis of Mr. Masalmani's capacity for rehabilitation when it relied on its own unsupported assumptions about the Michigan Department of Corrections. The trial court's assertions about the Department of Corrections, including its conclusion about what type of professional assistance Mr. Masalmani would be unlikely to receive in the Department, was purely speculative and not supported by the record evidence.

The trial court's analysis that Mr. Masalmani could not be rehabilitated without "intensive professional assistance" ignored the testimony of Dr. Danuloff. Dr. Danuloff testified that in his time in prison, Mr. Masalmani began to read religious books, including the Bible. Mr. Masalmani said he was "...learning about people...learning about how people should treat one another...learning about the difference between being righteous and being evil..." (Appendix, 237a-38a). The trial court ignored the fact that Mr. Masalmani had demonstrated progress, including that Mr. Masalmani's rate of getting misconducts in the Department of Corrections had "plunged." Dr. Danuloff observed that Mr. Masalmani "thinks before he acts" when out with other prisoners. He became a housing unit representative, became the unit barber, and was taking GED classes. (Appendix, 239a-240a).

The trial court, when assessing rehabilitation, took the testimony of Dr. Danuloff out of context. The trial court quoted a portion of the testimony where Dr. Danuloff had asked Mr. Masalmani whether what he had done was "righteous or evil." The trial court in its Order said Mr. Masalmani responded, "well, it was a little bit of both...And what he said was, well, I didn't have any choice." (Appendix, 369a). The entirety of Mr. Masalmani's response showed

recognition of his wrongdoing and his changing mindset. Mr. Masalmani said, “I didn’t have a choice. It’s how I was, it’s how I lived, it’s how I behaved. It’s kind of like if you’re in a house that’s on fire and you’re standing near the door. You leave the house. You don’t have any other choices. You leave the house, you get out.” When Dr. Danuloff asked how his actions were evil, Mr. Masalmani said, “I hurt people. I hurt people badly.” (Appendix, 242a).

Mr. Masalmani’s childhood was spent in incredibly difficult and chaotic environments, and he endured innumerable challenges. As *Miller* recognizes, children by and large are not able to extricate themselves from such environments. *Miller*, 567 US at 477. When the trial court looked at Mr. Masalmani, and Dr. Danuloff’s testimony, it should have acknowledged that, by age 22, Mr. Masalmani had actually made notable steps that, contrasted with his childhood environment, showed not just a possibility of rehabilitation, but rehabilitation in progress. By using Mr. Masalmani’s truly tragic personal history, accumulated over his short lifespan of 17 years, as aggravating evidence weighing against the possibility of rehabilitation, and by speculating with no foundation as to what might occur in the Department of Corrections, the trial court committed errors of law. The matter should be reversed and remanded for new sentencing.

C. The trial court’s consideration of the circumstances of the homicide offense was error; it ignored uncontroverted evidence, including expert testimony

The trial court listed out the circumstances of Mr. Masalmani’s offenses (not simply the homicide offense). (Appendix, 367a). After this list, the trial court said, “[t]here was no evidence that any of defendant’s criminal activity was precipitated by peer or family pressure...this factor weighs heavily in favor of finding that a sentence of life without the

possibility of parole is appropriate. Defendant had numerous opportunities to abandon his plan and instead drove with his co-defendant and Matthew Landry around town for hours before killing Landry in cold blood.” (*Id.*).

These findings were clearly erroneous. The trial court ignored the fact that Mr. Masalmani was, in fact, in the company of a peer. The trial court ignored the fact that according to the uncontradicted testimony of Dr. Danuloff, Mr. Masalmani was an unsocialized youth who lived with a sense of needing to fulfill his needs, “running the streets with other young people and committing acts that helped him meet his needs.” (Appendix, 234a-235a).

Perhaps most importantly, the trial court ignored defense Exhibit C (Appendix, 287a-292a)), the *Summary of Adolescent Developmental Science in re Juvenile Life Without Parole* authored by Dr. Keating. Dr. Keating wrote:

Peer susceptibility. Among the most incentivizing and arousing contexts for adolescent risk behavior is the susceptibility to peers, sometimes in response to pressure (to maintain social status) but also because of the rewards (both behavioral and brain-activated associated with peer influence. Under experimental conditions of peer presence, different neural circuits were activated than when performing a judgment task on one’s own. In combination with the limited PFC [prefrontal cortex] capabilities noted above, the impact of peers is substantially higher for adolescents than for adults.

(Appendix, 289a).

Mr. Masalmani as a child was abandoned by his family, and by those who should have stood in place of his family, including the government agencies that were charged with his care. (Appendix, 155a, 162a, 210a, 211a). After years of abuse and neglect in the foster care system, exposure to drugs, sex, and street life, it should come as no surprise that Mr.

Masalmani became involved in gang life and became “more and more oriented towards being with the kids on the street...he felt that he belonged.” (Appendix, 162a).

Throughout the time of Mr. Landry’s abduction and murder, Mr. Taylor and Mr. Masalmani were together. Later, before Mr. Landry’s death, Mr. Masalmani and Mr. Taylor were with others, including a much older man, Mr. Singleton, who sold them crack cocaine and smoked it with them. (Appendix, 295a). The peer influence described by Dr. Keating, based upon significant scientific research, is a powerful factor. The trial court did nothing to take this into account in analyzing the circumstances of the homicide offense and failed to craft an individualized sentence for Mr. Masalmani.

D. The trial court’s decision was not individualized as required by law¹²

“As a result of *Montgomery* and *Miller*, States must now ensure that prisoners serving sentences of life without parole for offenses committed before the age of 18 have the benefit of an individualized sentencing procedure that considers their youth and immaturity at the time of the offense.” *Adams v Alabama*, __ US __; 136 S Ct 1796, 1797 (2016) (Sotomayor, J., concurring in the decision to grant, vacate, and remand cases of juveniles serving life without parole). The trial court was required to provide a decision which was individualized to Mr. Masalmani. It did not do so.

Miller is derived in part from the Supreme Court of the United States’ death penalty jurisprudence. For decades, that Court has prescribed an individualized sentencing process

¹² While this Brief focuses on the requirements of *Miller* and *Montgomery*, individualized sentencing has long been required in Michigan. See *People v Chapa*, 407 Mich 309; 284 NW 2d 340 (1979).

in death penalty sentencing proceedings. The Eighth and Fourteenth Amendments require “individualized consideration of mitigating factors” in capital cases. *Lockett*, 438 US at 606. *Miller* expressly requires the same for juveniles facing life without the possibility of parole. *Adams*, 136 S Ct 1796 (Sotomayor, J., concurring).

The lack of individualized sentencing becomes apparent when the trial court’s opinion and order in Mr. Masalmani’s case are compared with the opinion and order in his co-defendant’s case. (Appendix, 372a-379a). For example, the trial court used the same language to talk about the age of the two adolescents:

...*Miller* dealt with juvenile defendants who were 14 years old at the time of their offenses—roughly two years younger than defendant...[Mr. Taylor] was a mere 14 months shy of his 18th birthday at the time of his offense.

(Appendix, 365a).

Miller dealt with juvenile defendants who were a mere 14 years old at the time of their offenses—a far cry from this case. [Mr. Masalmani] was only 4 months away from being an adult.

(Appendix, 375a). *Miller’s* relief is not reserved for those aged 14. The trial court failed to make the individualized findings required with regard to age. And indeed, Mr. Masalmani was a child with a “chaotic, traumatic” history, a “scared boy,” who suffered from ADHD, depression, and pediatric seizures; whose foster mother smoked marijuana with him and engaged in sexual relations in front of him; who required an IEP in school; who had been abused and neglected; a child who needed “constant direction;” a child who was noted to be “not very mature compared to the general population;” and who became “further and further behind” in his education. (Appendix, 132a-133a; 135a; 137a; 139; 154a-155a; 158a-160a). Mr. Masalmani was a far cry from an “average” 17-year-old juvenile.

There are additional examples throughout the court’s opinions:

- The first two pages of both orders, summarizing the relevant case law, are virtually identical (Compare Appendix, 362a-363a and 372a-373a);
- The summary of Dr. Keating’s testimony is virtually identical (Compare Appendix, 364a and 374a);
- The trial court summarized the “Circumstances of the Homicide Offense” in very similar language (Compare Appendix, 367a and 376-377a); and
- For both Mr. Taylor and Mr. Masalmani reached an identical—and incorrect—conclusion: that there was no evidence of peer or family pressure (Compare Appendix 368a and 377a).

With regard to the circumstances of the offense, despite the differing roles of the two adolescents, the trial court made the same conclusion (and again, ignoring the influence of the peer group).

There is nothing in the fact and circumstances of the crime which would warrant anything less than life in prison without the possibility of parole [for Mr. Masalmani].

(Appendix, 367a).

Simply put, the Court finds that 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 [for Mr. Taylor].

(Appendix, 377a).

Discussing “possibility of rehabilitation” for each of the adolescents, the trial court again selected certain limited and virtually identical passages from Dr. Keating’s testimony to support its identical conclusions—the “prospect for rehabilitation is negligible.” (Compare Appendix, 369a and 378a).

The trial court reached identical conclusions in sentencing the two adolescents to life without the possibility of parole. (Compare Appendix, 370a and 378a). The lack of individualized language conveys a lack of individualized analysis. Mr. Masalmani’s and Mr.

Taylor's roles in this crime differed; their ages differed; their family backgrounds differed; and their rehabilitation prospects likely differed too. But no individualized analysis occurred.

This lack of individualized sentencing was an error of law and an abuse of discretion. *Duncan*, 494 Mich at 723 ("A trial court necessarily abuses its discretion when it makes an error of law."). As stated above, the Supreme Court of the United States has made it clear that the *Miller* sentencing proceeding is to be an individualized sentencing proceeding. Instead of receiving that individualized proceeding, the trial court worked from the same template to reach a result that did not reflect individualized or careful consideration of the *Miller* factors for their mitigating effect. Mr. Masalmani's case should be reversed, and remanded for a new sentencing.

