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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

IHAB MASALMANI,
Defendant-Appellant. **No. 154773**

Macomb Circuit Court No. 2009-005244-FC
COA No. 325662

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

Do either the constitution or Michigan statute place any burden of persuasion that so-called *Miller* factors do or do not suggest a LWOP sentence?

Amicus answers NO.

Statement of Facts

Amicus joins the statement of facts of the People of the State of Michigan.

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Argument

I.
Neither the constitution nor Michigan statute place any burden of persuasion that so-called *Miller* factors do or do not suggest a LWOP sentence

Introduction

This Court has granted leave to appeal, and directed that to be addressed is "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* . . .' as potentially mitigating circumstances. MCL 769.25(6)." The Court further directed that "In particular, the parties shall address:

- which party, if any, bears the burden of proof of showing that a *Miller* factor does or does not suggest a LWOP sentence;
- whether the sentencing court gave proper consideration to the defendant's "chronological age and its hallmark features," . . . by focusing on his proximity to the bright line age of 18 rather than his individual characteristics; and
- 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.[1]

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[1] *People v. Masalmani*, No. 154773, 2019 WL 1504069, at 1 (2019). The issue raised by defendant in his application is:

> Does the imposed life without parole sentence violate Ihab Masalmani's Eighth Amendment and due process rights where the court failed to adhere to individualized sentencing, failed to properly consider and apply the *Miller* factors, and failed to apply the proper standard of review?

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Amicus answers that while the defendant has the burden of presenting *evidence* of "*Miller* factors" in mitigation to the sentencing court,

> 1. neither the defendant nor the prosecution bears any burden of persuasion in showing that these mitigating factors do or do not suggest a LWOP sentence;
>
> 2. the sentencing court gave proper consideration to defendant's age; and
>
> 3. the trial court did not abuse its consideration in its consideration of defendant's home life and the programs available in the Department of Corrections.

Amicus leaves the discussion of points 2. and 3. to the People of the State of Michigan, and limits its discussion to point 1.

Discussion

A. The holdings of *Miller* and *Montgomery* establish that which is to be considered by a sentencing judge who is considering a possible life without parole sentence for a juvenile—and thus ought to presented, where available, and discussed and argued by the parties—but do not place any "sentencing burden of persuasion" with regard to mitigation on either party, any more than the constitution places any burden of persuasion on either the prosecution or defense on mitigating factors in a death-penalty case

Neither *Miller v. Alabama*[2] nor *Montgomery v. Louisiana*[3] create and place a "sentencing burden of proof" as to "showing that a *Miller* factor does or does not suggest a LWOP sentence" on either party when a trial judge considers whether to

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[2] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

[3] *Montgomery v. Louisiana*, 577 U.S. —, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).

sentence a juvenile convicted of 1st-degree murder to life without parole. *Miller* said that a sentencing scheme for 1st-degree murders committed by juveniles that requires a sentence of nonparoleable life in prison "prevents those meting out punishment *from considering* a juvenile's 'lessened culpability' and greater 'capacity for change.'"[4] These statutory schemes are unconstitutional as applied to juveniles because they "prevent *the sentencer* from *taking account* of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority *from assessing whether* the law's harshest term of imprisonment proportionately punishes a juvenile offender."[5] The Court said:

> To recap: Mandatory life without parole for a juvenile *precludes consideration* of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It *prevents taking into account* the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . . And finally, this mandatory punishment disregards the possibility of

[4] *Miller,* 132 S. Ct. at 2460 (emphasis supplied).

[5] Id. at 2466 (emphasis supplied).

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rehabilitation even when the circumstances most suggest it.[6]

Though the Court majority predicted that consideration of these factors would render "uncommon" life without parole sentences for juveniles who murder,[7] the Court did not "foreclose a sentencer's ability to make that judgment in homicide cases," but required the sentencing judge to "*take into account* how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[8] The majority believed life-without-parole sentences would be rare because, in considering in sentencing how "children are different," the sentencing court would have "great difficulty . . . distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[9] And this Court has recognized that the Supreme Court was offering up its prediction on the matter, not stating a rule of law.[10]

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[6] Id. at 2468 (emphasis supplied).

[7] Id. at 2469.

[8] Id.

[9] Id.

[10] *People v. Skinner*, 502 Mich. 89, 131 (2018) (the Supreme Court "did not impose any requirement on sentencing courts to explicitly find that a juvenile offender is or is not 'rare' before imposing life without parole"); see also id. at 129 (the statement that life without parole sentences for juvenile 1st-degree murders will be uncommon "was simply the Court's prediction").

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Montgomery further makes clear that what is required at sentencing of a juvenile convicted of a 1st-degree murder is that the sentencing judge consider those mitigating factors of youth pertinent to the case before it. The Court held *Miller* fully retroactive, even to cases on collateral attack. Because of the statutory scheme under which Montgomery was sentenced, requiring nonparoleable life, "Montgomery had no *opportunity to present mitigation evidence to justify* a less severe sentence, which 'might have included Montgomery's young age at the time of the crime; expert testimony regarding his limited capacity for foresight, self-discipline, and judgment; and his potential for rehabilitation.'"[11] And *Miller*, the Court said, requires that juveniles convicted of nonparoleable murders "must be given the opportunity to show their crime did not reflect irreparable corruption."[12] This language—that the juvenile must be given the opportunity "to show [his or her] crime *did not* reflect irreparable corruption"—appears almost to place a burden of persuasion on the defendant. But amicus does not so argue. Rather, the Supreme Court has mandated that the defendant be given the opportunity to "present mitigation evidence" for the sentencing court to consider to reach the sentencing *conclusion* as to life without parole or some other legal sentence; defendant must have the opportunity to convince the judge of the appropriate judgment, but neither the defense nor the prosecution carries a burden of persuasion with regard to

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[11] *Montgomery*, 136 S.Ct. at 726 (emphasis supplied).

[12] Id. at 736.

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mitigation. The sentence of the court is a *judgment*, not a finding of fact, as amicus will discuss further.

B. *People v. Hyatt* establishes that there is no presumption in favor of a parolable life sentence that the prosecution must overcome at the sentencing of a 1st-degree murderer under the age of 18 at the time of the murder

MCL 769.25 provides in pertinent part that:

> (6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in *Miller v. Alabama* . . . and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.
>
> (7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.

In *People v. Hyatt*,[13] this Court found the Court of Appeals' explication of the appropriate review of the trial court's sentencing decision wanting. That court had said that "an appellate court should view [a life without parole sentence] as inherently suspect," while at the same time stating that "we do not suggest a presumption against the constitutionality of that sentence, [but] we would be remiss not to note that review of that sentence requires a searching inquiry into the record with the understanding that, more likely than not, a life-without-parole

[13] *People v. Hyatt*, 502 Mich. 128 (2018).

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sentence imposed on a juvenile is disproportionate."[14] Despite the Court of Appeals disclaimer, this Court found that the standard applied by that court sounded "tantamount to a presumption against life-without-parole sentences,"[15] a presumption this Court rejected. "[A]ll *Miller* requires sentencing courts to do," held this Court, "is to *consider* how children are different before imposing life without parole on a juvenile,"[16] but "neither *Miller* nor *Montgomery* impose[d] a presumption against life without parole for those juveniles who have been convicted of first-degree murder on either the trial court or the appellate court. *Miller* and *Montgomery* simply require that the trial court *consider* 'an offender's youth and attendant characteristics' before imposing life without parole."[17] And, because "[t]he trial court remains in the best position to determine whether each particular defendant is deserving of life without parole," the decision made by the trial court is reviewed, held this Court, "under the traditional abuse-of-discretion standard."[18] This Court has not, in its grant of leave, directed the parties to brief whether *Hyatt*

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[14] *People v. Hyatt*, 316 Mich. App. 368, 425-426 ((2016).

[15] *People v. Hyatt*, 502 Mich. at128.

[16] Id. at 129-130.

[17] Id. at 131 (emphasis supplied).

[18] Id. at 137.

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should be overruled, and amicus thus does not address that question (and it should not be overruled).[19]

There is, then, no thumb on the scale at the outset of the sentencing hearing, placing a burden of persuasion as to mitigation on either party.

C. The death-penalty analogy demonstrates that mitigation is argued to the sentencing court, but not a matter of fact on which either party bears a burden of persuasion

As this Court noted in *Hyatt*, "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. *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 736 ('[P]risoners ... must be given the opportunity to show their crime did not reflect irreparable corruption....')."[20] But in the end no burden of persuasion rests on *either* party with regard to mitigation, for the sentencing conclusion is not a fact but a *judgment*, and neither the constitution, nor Michigan's statutory scheme, place a burden of persuasion with regard to mitigation on either party.

The analogy to the death penalty, as well as the specific statements in *Miller* and *Montgomery* noted previously, make the point. With the death penalty, the

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[19] If the Court in its consideration of this case decides to reopen the issues decided in its very recent decision in *Hyatt*, it at least should direct supplemental briefing on the question to allow the parties and amicus on either side to *fully* address it (appellant devotes a page and a half of his brief to that point, which, again, is not included in this court's grant of leave to appeal).

[20] Id. at 131.

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sentencing hearing consists of two phases, the *eligibility phase* and the *selection phase*.[21] Conviction of an accused for homicide carrying the possibility of the penalty of death is insufficient to render the convicted murderer eligible for the death penalty. Rather, some "binary fact" or facts concerning the *commission of the offense* must then be determined by the jury, and beyond a reasonable doubt,[22] to render the convicted murderer *eligible* for the death penalty. A determination that an appropriate aggravating fact or facts has been proven beyond a reasonable doubt does not result, then, in the death penalty; rather, the defendant is then eligible for the death penalty, and at the selection phase of sentence mitigating facts may be presented. *"This 'selection' decision is not one of finding fact.*"[23] And indeed, it is constitutional for a statutory scheme to place the burden of persuasion on the *existence* of mitigating factors *on the defendant* by at least a standard of a preponderance of the evidence, though there is no burden of persuasion as to the *ultimate judgment* regarding the sentence, which belongs to the judge or jury alone. In rejecting a claim that the jury must be instructed that it need not find mitigating circumstances beyond a reasonable doubt, the Supreme Court not long ago said that:

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[21] See *Kansas v. Carr*, __U.S.__, 136 S. Ct. 633, 642, 193 L. Ed. 2d 535 (2016).

[22] *Ring v. Arizona,* 536 U.S. 584 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Hurst v. Florida*, __U.S.__, 136 S. Ct. 616, 620, 193 L. Ed. 2d 504 (2016).

[23] LaFave, Israel, King, & Kerr, *6 Criminal Procedure* (4th Ed.), § 26.4(I) (emphasis supplied).

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> Approaching the question in the abstract, and without reference to our capital-sentencing case law, *we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination* (the so-called 'selection phase' of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called 'eligibility phase'), *because that is a purely factual determination*. The facts justifying death set forth in the Kansas statute either did or did not exist—and one can require the finding that they did exist to be made beyond a reasonable doubt. *Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not*.[24]

And the en banc Sixth Circuit not long ago held that at the selection phase of a death-penalty sentencing hearing, "the result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, *the judgment is moral* . . . . What [is required] is not a finding of fact, *but a moral judgment*."[25] In other words, said the court, what is required "is not a finding of fact in support of a particular sentence. . . . [It] requires. . . a determination of *the sentence itself,* within a range for which the defendant is already eligible."[26]

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[24] *Kansas v. Carr*, 136 S.Ct. at 642 (emphasis supplied); see also *Kansas v. Marsh*, 548 U.S. 163, 171, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006).

[25] *United States v. Gabrion*, 719 F.3d 511, 532-533 (CA 6, 2013) (en banc) (emphasis supplied).

[26] *United States v. Gabrion*, 719 F.3d at 533 (emphasis supplied).

D. States that place a burden of persuasion on mitigation as though it were a finding of fact are mistaken

Defendant notes jurisdictions that have held that the prosecution carries a burden of persuasion with regard to mitigation. These jurisdictions are mistaken, and their holdings inconsistent with *Miller* and *Montgomery*.[27] And an opinion placing a burden on the defendant is the Washington Supreme Court decision in *State v. Ramos*.[28] There the court said that "If the juvenile proves by a preponderance of the evidence that his or her crimes reflect transient immaturity, substantial and compelling reasons would necessarily justify an exceptional sentence below the standard range because a standard range sentence would be unconstitutional" [the court considering a standard-range sentence that it viewed as a "de facto" life without parole sentence].[29] Put another way, the court held that "*Miller* does not require that the State assume the burden of proving" that a sentence of life without parole should be imposed, rather than "placing the burden on the juvenile offender to prove an exceptional sentence is justified."[30] And so the state statutory scheme for departures from the standard range for the sentence,

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[27] And some are compelled by state statutory schemes. See e.g. *Conley v State*, 972 N.E.2d 864 (Ind., 2012); *State v Houston*, 353 P.3d 55 (Utah, 2015).

[28] *State v. Ramos*, 387 P.3d 650 (2017). The Court considered what it concluded was a "de facto" life without parole decision to fall within *Miller*, an issue not involved in the case here.

[29] Id. at 658.

[30] Id. at 659.

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considering cases where the standard range for a juvenile was a de facto life without parole sentence, was constitutional.

Certainly a state may choose to place a burden of persuasion on *either* party with respect to mitigation. But Michigan has not done so, and the better scheme is to understand that the trial judge must consider mitigating factors of youth that exist in the case, the parties may argue their weight, and the sentencing judge must then make a judgment, which is not a finding of fact. This is what occurs presently in Michigan. Neither the constitution nor Michigan statute require something different. And that judgment is reviewed on the record for abuse of discretion (and findings of fact for clear error).

E. Conclusion

Facts that go to mitigation with regard to the particular offender and the particular offense—"immaturity, impetuosity, and failure to appreciate risks and consequences. . . . the family and home environment . . . . the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"[31]— should be presented by the defendant, who seeks, of course, to persuade the trial court both of their existence and of their weight in the trial court's sentencing judgment. After all, *Miller*'s holding was that the sentencer "must have the opportunity to consider

[31] *Miller v. Alabama*, 567 U.S. at 477, 132 S. Ct. at 2468.

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mitigating circumstances,"[32] and so the defendant concomitantly must be given the opportunity to present and argue those mitigating facts and circumstances. Each party then attempts to *persuade* the sentencing judge regarding the appropriate sentence, considering all factors, but there is no legal "burden of persuasion" placed on either. The trial judge may make findings of fact in reaching his or her judgment as to the appropriate sentence, but the end result is a judgment, not a finding of fact, just as in death penalty cases. Indeed, it would be anomalous in the extreme if the constitution were viewed as requiring that a sentence of life without parole be the result of a finding of fact of "irreparable corruption," while no finding of ultimate fact—but rather a considered judgment—results in a judgment of the penalty of death.

Under our statute, and under *Miller* and *Montgomery*, a juvenile convicted of 1st-degree murder is "life-without-parole eligible" upon conviction of the crime itself. Nothing in *Miller* or *Montgomery* requires an eligibility-type hearing, where aggravating facts concerning the commission of the crime must be proven beyond a reasonable doubt. Rather, the sentencing proceeding under the statute is a "selection-type" hearing, where individualized sentencing occurs, and the sentencing judge hears and considers mitigating facts—and factors in aggravating that may counter them. The sentencing judge's determination, then, is "is one of judgment, of shades of gray; like saying that Beethoven was a better composer than

[32] Id., 567 U.S. at 489, 132 S. Ct. at 2475.

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Brahms. . . . *the judgment is moral* . . . . What [is required] is not a finding of fact, *but a moral judgment*. . . . a determination of *the sentence itself,* within a range for which the defendant is already eligible."

A recent federal decision exemplifies the proper sentencing process. A district judge re-sentenced a juvenile murderer from life without parole to 600 months in prison for five homicides. Defendant argued that his 50-year sentence constituted a *de facto* sentence of life without parole, which was substantively unreasonable under *Miller*, and the Eighth Circuit essentially accepted this formulation of the question in holding that it reviewed "the substantive reasonableness of a sentence under a deferential abuse-of-discretion standard."[33] Looking to the "*Miller* factors" the court said that the sentencing court was required to take into account the "distinctive attributes of youth," and abused its discretion if it failed to "consider a relevant factor that should have received significant weight."[34] The sentencing court, then, was to consider, in exercising its sentencing discretion, all factors relevant to sentencing, "as informed by the Supreme Court's Eighth Amendment jurisprudence."[35] The sentence was thus appropriate because the district judge "made an individualized sentencing decision that took full account of 'the distinctive attributes of youth,' explaining its sentence in a thorough, 24-page

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[33] *United States v. Jefferson*, 816 F.3d 1016, 1019 (CA 8, 2016).

[34] Id.

[35] Id. at 1020.

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Memorandum of Law and order."[36] The district judge did not fail "to consider a relevant factor, [the defendant's] youth, that should have received significant weight," and also "properly gave significant weight to the extreme severity of [the defendant's] crimes."[37] Applying, then, the established abuse-of-discretion standard, the Eighth Circuit affirmed the sentence.

Under *Hyatt* and *Skinner*, this is how these matters should proceed.

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[36] Id.

[37] Id., at 1021.

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Relief

Wherefore, amicus respectfully requests that this Court affirm the sentence.

Respectfully submitted,

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