STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

SUPREME COURT: 154773
COURT OF APPEAL: 325662
Macomb CC: 2009-005244-FC

v

IHAB MASALMANI,
Defendant-Appellant.

_____/

***AMICUS CURIAE* DEFENDANT-APPELLANT'S BRIEF ON APPEAL**

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QUESTIONS PRESENTED

I. Must the government bear the burden of proof at a *Miller* motion and sentencing hearing, consistent with state law, as well as 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."
Appellee answers, "No."
Amici answers, "Yes."

II. Must this Court establish procedural protections to ensure that the substantive guarantee of *Miller* and *Montgomery* is upheld – including that mitigating effect is given to youth and potential for rehabilitation - and that our statute is implemented in a way that comports with the Eighth Amendment and the Due Process Clause?

Court of Appeals answers, "No."
Ihab Masalmani answers, "Yes."
Appellee answers, "No."
Amici answers, "Yes."

INTERESTS OF AMICUS CURIAE

The Criminal Defense Attorneys of Michigan ("CDAM") is an organization consisting of hundreds of criminal defense attorneys licensed to practice in this state. CDAM was organized for the purposes of: promoting expertise in criminal and constitutional law; providing training for criminal defense attorneys to improve the quality of representation; educating the bench, bar, and public of the need for quality and integrity in defense services; promoting enlightened thought concerning alternatives to and improvements in the criminal justice system; and guarding against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws. *CDAM Constitution and By-laws,* art 1, § 2.

This Court permits CDAM to file an *amicus curiae* brief without motion for leave from the Court. MCR 7.312(H)(2).

SUMMARY OF ARGUMENT

Michigan is the de facto world leader for the jurisdiction with the most children serving life without parole. The implementation of *Miller* and *Montgomery* in Michigan has been characterized by disparate interpretations by local prosecutors and judges and a resistance to constitutional rules, which has led to the arbitrary and geographically and racially disparate sentencing of children to die to prison in our state.

This Court can and must provide uniform procedural guidance for our trial courts, so that youth facing the possibility of death in prison can be sentenced based on accurate, reliable and complete information, that provide for uniformity and statewide consistency, in hearings that are constitutionally compliant and consistent with prior state law.

This amicus brief describes who must bear the burden of proof at *Miller* as a matter of fundamental state law; determines that this burden must be, at least, by a clear and convincing evidence standard; overviews the current arbitrary and unconstitutional implementation of *Miller* in Michigan; and describes additional procedural rules that must be adopted to ensure that, if we insist on leading the world in children sentenced to die in prison, we do so in ways that comport with basic fairness.

ARGUMENT

I. The Imposition of Life Without Parole on Children in Michigan since *Miller v Alabama* Shows the Need for This Court to Establish Procedural Rules to Ensure that Miller Hearings and Sentencings are Constitutionally Compliant.

A. The post-*Miller* landscape.

Since *Miller*, Michigan has become the world leader for the jurisdiction with the most juveniles serving life without parole sentences. Juveniles serving life without parole is extremely rare in the rest of the world and is barred by the UN Convention on the Rights of the Child, which has been ratified by every country in the world except the United States.[1] When *Miller* was decided, 28 states had mandatory life without parole and over 2500 people were serving life without parole for homicides committed as a juvenile, with 2000 of those sentences mandatorily imposed. See *Miller,* 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012); see also *id.*

[1] The UN Convention on the Rights of the Child, art 37 (1989) (stating: "(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment *nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age*") (emphasis added). Until 2014, the United States, Somalia and South Sudan were the countries that had not ratified the CRC; Somalia and South Sudan have since ratified the CRC. See, e.g., Human Rights Watch, *25th Anniversary of the Convention on the Rights of the Child (2014)*, available at <https://www.hrw.org/news/2014/11/17/25th-anniversary-convention-rights-child> (accessed January 22, 2020). See also Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 USF L REV 983 (2008).

(ROBERTS, C.J., dissenting). Pennsylvania was the jurisdiction with the largest number of juveniles serving life without parole, with over 500 individuals, with Michigan in second place. Michigan's high numbers were attributable in part to unreviewable direct file laws, automatic prosecution of 17-year-old juveniles as adults, the inclusion of both premediated and felony murder in our first-degree murder statute, as well as life without parole as the mandatory penalty for all first-degree murder.[2]

Two years ago, Michigan and Pennsylvania were the only states with more than 100 juvenile life without parole sentences,[3] and Michigan, Pennsylvania and Louisiana[4] now account for two thirds of the juvenile lifers in the country (and therefore the world).[5] The pendulum has swung to where the majority of states do not impose the sentence. As of January 2020, 28 states either ban or have no one serving juvenile life without parole.[6]

While Michigan's prosecutors have continued to press for the most extreme sentence for

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[2] Kimberly Thomas, *Juvenile Life Without Parole: Unconstitutional in Michigan*, 90(2) MICH BAR J 34, 35 (2011) (describing the "perfect storm" of statutes that combine to create the high numbers of youth sentenced to life without parole in Michigan); Fair Punishment Project, *Juvenile Life Without Parole in Wayne County*, available at <http://fairpunishment.org/wp-content/uploads/2016/07/FPP-WayneCountyReport-Final.pdf> (accessed January 22, 2020).

[3] Campaign for Fair Sentencing of Youth, *Does Your State Still Use Life-Without-Parole Sentences For Kids?*, available at <https://www.fairsentencingofyouth.org/does-your-state-use-juvenile-life-without-parole-jlwop/> (accessed January 22, 2020).

[4] Louisiana passed legislation in June 2017 limiting juvenile life without parole to defendants convicted of first-degree murder (which does not include felony murder) and opens the door to parole eligibility after 25 years. See La Code Crim Proc Ann § 878.1 (2017).

[5] The Sentencing Project, *Juvenile Life Without Parole: An Overview* (July 23, 2019), available at <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> (accessed January 22, 2020).

[6] Campaign for Fair Sentencing of Youth, *States that Ban Life Without Parole for Children* (map showing 22 states that ban and 6 states that have no one serving JLWOP sentence), available at <https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/> (accessed January 22, 2020).

two-thirds of our cases, and nearly 200 individuals are still serving life without parole.[7] Pennsylvania, by contrast, has implemented *Miller* and *Montgomery*. See *Miller*, *supra*; *Montgomery v Louisiana*, 577 US __; 136 S Ct 718, 726; 193 L Ed 2d 599 (2016). Of the 521 identified juvenile lifers in Pennsylvania, 454 have been resentenced.[8] As of 2018**, of the over 300 individual resentenced at that time, 5 had received a new life without parole sentence**.[9] At the resentencing, an individual in Pennsylvania must be shown to be "incapable of rehabilitation;" *Commonwealth v Batts*, 163 A3d 410, 416; 640 Pa 401 (2017) (effectively narrowing the imposition of life without parole to a class of defendants and limiting the arbitrary imposition of life without parole). Of those resentenced in Pennsylvania, at least 221 people have already been released from custody; a 73% parole rate.[10] See *id.*

In addition to *Miller* being applied differently in Michigan than other states, the burden of a life without parole sentence does not fall evenly on all youth who are alleged to have committed homicide offenses. Many individuals would not even be serving life without parole if they had taken plea offers given to them – even though *Miller* explicitly acknowledges the difficulty that young people have working with and trusting their attorneys and understanding the

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[7] Allie Gross, *More Than Half of Michigan's Juvenile Lifers Still Wait for Resentencing*, DETROIT FREE PRESS (August 16, 2019) (stating that prosecutors requested LWOP in 66% of cases, and that approximately 55% of all of Michigan juvenile lifers are still serving LWOP over seven years after *Miller*), available at <https://www.freep.com/in-depth/news/local/michigan/2019/08/15/juvenile-lifers-michigan/1370127001/> (accessed January 22, 2020).

[8] See Pennsylvania Department of Corrections, Juvenile Lifers Information (November 30, 2019), available at <https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Juvenile-Lifers-Information.aspx> (accessed January 22, 2020).

[9] Samantha Melamed, *Why are Juvenile Lifers From Philly Getting Radically Different Sentences From Those in the Rest of Pennsylvania?*, PHILADELPHIA INQUIRER (July 10, 2018), available at <https://www.inquirer.com/philly/news/philly-bucks-county-pennsylvania-juvenile-lifers-jlwop-juvenile-law-center-life-without-parole-20180710.html>.

[10] See Pennsylvania Department of Corrections, *supra*.

choices before them. *Miller*, 567 US at 477-78. In Wayne County, which has the largest juvenile lifer population in Michigan, nearly 1/3 of the juvenile lifers were offered term-of-years plea agreements, averaging about 20 years.[11] The Wayne County report stated that "[m]ore than one in four persons serving a JLWOP sentence had co-defendants who, though not necessarily less culpable, are serving less time or have already been released," which is also in line with *Miller*'s teachings on young people's comparative difficulty making decisions about their cases given their short-term time horizon and challenges working with counsel.

The zip code in which an individual committed his crime affects the likelihood that he will be offered a plea agreement to a lesser homicide, as well as the likelihood that, if convicted of first-degree murder, a life without parole sentence will be sought. In some counties, prosecutors have requested new life without parole sentences for all or nearly every single individual case. See, e.g., NY Times Opinion, *Michigan Prosecutors Defy the Supreme Court*, NEW YORK TIMES (September 11, 2016). (noting, for example, that Oakland County prosecutor is seeking life without parole for 44 of 49 juvenile lifers).

"Black youth are sentenced to life without parole in disproportionate numbers nationally and in Michigan. "[A]lthough Blacks constitute only about 13 percent of the U.S. population, as of 2009, Blacks constitute 28.3 percent of all lifers, 56.4 percent of those serving LWOP, and 56.1 percent of those who received LWOP for offenses committed as juveniles," according to a national ACLU report.[12] In Wayne County, Michigan, 39% of the population is African-

[11] Fair Punishment Project, Wayne County report, *supra* at 9.
[12] ACLU, *Racial Disparities in Sentencing, Written Submission of the American Civil Liberties Union on Racial Disparities in Sentencing Hearing on Reports of Racism in the Justice System of the United States Submitted to the Inter-American Commission on Human Rights 153rd Session*, October 27, 2014 (relying on data from Ashley Nellis & Ryan S. King, The Sentencing Project, No Exit: The Expanding Use of Life Sentences in America 11-14, 17, 20-23 (2009), available at

American, but 93% of the 150 juvenile lifers are African American.[13]

African-American youth are sentenced to life without parole at a greater rate than white youth. In Michigan prior to *Miller*, African-American youth were serving LWOP sentences at a rate 10 times that of their white counterparts.[14] Nationally, in 2018, for every eight black youth arrested for murder, one was sentenced to life without parole, but for white youth, for every 12 youth arrested for murder, one was sentenced to life without parole.[15] In other words, of youth arrested for murder, black youth were 1.59 times more likely to receive a life without parole than white youth.[16] In addition to the race of the youth arrested for murder, the race of the homicide victim also appears to affect who receives life without parole sentences.[17]

B. *Miller* hearings and sentencings in Michigan must function as *Miller/Montgomery* dictates, so that individuals who are not irreparably corrupt are not unconstitutionally sentenced to life without parole.

As this Court recognized in *Skinner*, "courts are not allowed to sentence juveniles who are not irreparably corrupt to life without parole" as a matter of substantive constitutional law. *People v Skinner*, 502 Mich 89, 125; 917 NW2d 292 (2018); See also US Const, Am VIII; Const 1963, art 1, § 16.

<http://www.sentencingproject.org/doc/publications/inc_NoExitSept2009.pdf> (accessed January 22, 2020).

[13] Fair Punishment Project, *supra*, p 8.

[14] Human Rights Watch, *The Rest of Their Lives: Life without Parole for Youth Offenders in the United States in 2008*, available at <https://www.hrw.org/sites/default/files/reports/us1005execsum.pdf> (accessed January 22, 2020).

[15] *Id.* at p 7 (reporting on average of data collected from 25 states).

[16] See *id.*

[17] Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey* (March 2012) (The Sentencing Project) ("While 23.2% of juvenile arrests for murder involve an African American suspected of killing a white person, 42.4% of JLWOP sentences are for an African American convicted of this crime. White juvenile offenders with African American victims are only about half as likely (3.6%) to receive a JWLOP sentence as their proportion of arrests for killing an African American (6.4%).").

In Michigan, there is no objective criteria required to narrow those who are subjected to the possibility of, and who actually receive, a life without parole sentence. As a result, the implementation of our statute has been completely arbitrary. Neither the statute nor its implementation requires life without parole to be imposed on the "worst of the worst"; instead the statute allows that it be imposed on any youth regardless of whether he committed a third premeditated murder or whether he committed a first-offense felony murder. This flies in the face of the Eighth Amendment.

In 1972, the Court in *Furman* announced that the death penalty was unconstitutional because it constituted cruel and unusual punishment in violation of the Eighth Amendment. *Furman v Georgia*, 408 US 238, 239; 92 S Ct 2726; 33 L Ed 2d 346 (1972). In large part, the Court's concerns centered on the fact that the death penalty was applied "wantonly and [so] freakishly"[18] and that state statutes failed to provide coherent procedures or criteria for its application.[19]

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[18] *Id.* at 309-10 (STEWART, J., concurring).

[19] See *Gregg v Georgia*, 428 US 153, 189; 96 S Ct 2909; 49 L Ed 2d 859 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); Furman, 408 US at 309-10 (STEWART, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual… . I simply conclude that [the constitution] cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."). See also Betty B. Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 NYU L REV 811, 813-19 (1995) (discussing the evolution of the death penalty in America, and citing reasons for the drop in executions prior to *Furman* as including the rise in habeas corpus petitions for state prisoners and Civil Rights Movement leaders' growing concerns that the death penalty could be easily applied in a racially discriminatory fashion by juries); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB LJ 347, 369-72 (1999) (noting that although federal executions in the pre-*Furman* twentieth century were "relatively infrequent," a growing concern mounted that the "absolute and unguided discretion granted to federal juries in capital punishment cases would follow discriminatory patterns).

The landmark ruling required that states create narrowing criteria to limit the categories of those eligible for sentences of death. Numerous states appeared before the Court in subsequent years to test the constitutionality of new state statutes, but many were struck down for failing to "fulfill *Furman's* basic requirement [to] replac[e] arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Woodson v North Carolina*, 428 US 280, 303; 96 S Ct 2978; 49 L Ed 2d 944 (1976). A few years later in *Gregg v Georgia*, the Court reinstated the death penalty. 428 US 153 (1973). The Court found in *Gregg* that the inclusion of narrowing aggravating factors in the new state legislation sufficiently addressed the Court's central concern: that the death penalty was being applied in an arbitrary and capricious manner.[20]

Death penalty jurisprudence and sentencing practices are relevant to the juvenile LWOP context because they informed the Court's Eighth Amendment analyses of juvenile sentencing practices in *Miller* and *Montgomery*. Notably, the Court in both cases recognized that sentencing juveniles to life without parole bears a strong resemblance to sentencing adults to death.[21] In both cases, the defendant is receiving the most severe, constitutionally permissible sentence, and therefore Eighth Amendment considerations are heightened. *Roper v Simmons*, 543 US 551, 568; 125 S Ct 1183; 161 L Ed 2d 1 (2005) ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.") (citing *Thompson*, 487 US 815, 856; 108 S Ct 2687; 101 L Ed 2d 702 (O'CONNOR, J., concurring). The Court in *Miller*

[20] *Gregg*, 428 US at 171–72, 189 ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

[21] *Graham v Florida,* 560 US 48, 69-70; 130 S Ct 2011 (2010) ("[Y]et life without parole sentences share some characteristics with death sentences that are shared by no other sentences.").

used this analogy to find that mandatory LWOP sentences for juveniles violate the Eighth Amendment protection against cruel and unusual punishment. *Miller*, 567 US at 474-75. Moreover, the Court has relied upon its most pivotal Eighth Amendment cases—*Lockett*, *Tison*, *Enmund*, *Kennedy*, *Atkins,* and *Coker*—to discuss juvenile LWOP sentences, suggesting their relevance and importance to this area of law.

Just as the Court's concern in *Furman* was about preventing an unfair and arbitrary application of severe punishment, so too must this Court be concerned with ensuring fairness in juveniles facing life without the possibility of parole in line with *Miller* and *Montgomery*. The procedural questions on which this Court has granted leave must place these necessary parameters so that "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.

II. The Government Must Bear the Burden at *Miller* Motion and Sentencing Hearings and That Burden, At a Minimum, is Clear and Convincing Evidence.

This Court's first question in its order granting leave[22] contains two separate inquiries: First, who bears the burden of proof at a motions hearing under MCL 769.25 and/or MCL 769.25a? Second, what is the standard of proof at that hearing?

A. As a matter of fundamental state law, the burden must be borne by the prosecution.

Under the juvenile sentencing statute, the prosecuting attorney must file a "motion" to seek "to sentence a defendant...to imprisonment for life without the possibility of parole." MCL

[22] This Court's order states: "In particular, the parties shall address: (1) which party, if any, bears the burden of proof of showing that a *Miller* factor does or does not suggest a LWOP sentence. . ." Order, *People v Masalmani*, No. 154773 (April 5, 2019).

769.25(2). This motion "shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole." *Id.* at (3). As a result of the state filing this motion, "the court shall conduct a hearing on the motion as part of the sentencing process." MCL 769.25(6). During that motion hearing, at a minimum, the burden of proof is a preponderance of the evidence and is placed on the prosecutor. The court's failure to follow this motion practice and place the burden on the prosecuting attorney violated Ihab Masalmani's right to due process of law as guaranteed by US Const, Am XIV and Const 1963, art 1, § 17.

As an initial matter, the language of MCL 769.25 is clear and unambiguous and does not require judicial interpretation. See *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004) ("[W]hen statutory language is unambiguous, judicial construction is not required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed."). The statute requires that the state file a motion, specifying the grounds that it seeks to establish justifying a life without parole sentence. The language requiring a "motion" is unambiguous and must be enforced as written. *People v Gardner,* 482 Mich 41, 50; 735 NW2d 78 (2008) (stating that if statutory language is unambiguous, courts must enforce its plain meaning).

1. In Michigan, the moving party bears the burden; nothing about the process set up by our legislature changes this standard principle.

Well-established state motion practice rules require the movant to bear the burden and at this hearing the prosecuting attorney should have been required to bear that burden. See *People v Van Camp*, 356 Mich 593, 602–03; 97 NW2d 726 (1959) (holding that the burden was on the movant of a motion in a criminal proceeding); *Schaffer ex rel Schaffer v Weast*, 546 US 49, 56-57; 126 S Ct 528; 163 L Ed 2d 387 (2005) ("[T]he ordinary default rule is that plaintiffs bear the risk of failing to prove their claims."); see also C. Mueller & L. Kirkpatrick, Evidence § 3.1, p

104 (3d ed 2003) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request.").

Michigan case law has firmly established that the moving party bears the original burden.[23] For example, during a Motion to Change Venue, the burden of showing that a fair trial cannot be obtained is on the party seeking the change of venue. See *People v Florinchi*, 84 Mich App 128, 136; 269 NW2d 500 (1978). As another example, if the government moves to admit other acts as evidence in a criminal trial, it bears the burden of establishing the relevance of that evidence. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Similarly, in civil cases, the original burden falls on the movant. See e.g., *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009) ("The moving party…has the initial burden [in a Motion for Summary Judgment]."); *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003) ("The movant, of course, has the burden of proving by a preponderance of the evidence…").

In passing MCL 769.25, the Michigan Legislature understood and presumed that either the prosecuting attorney would file a motion and bear the burden, or if no motion was filed, the court would sentence the defendant to a term of years. See *People v Likine*, 492 Mich 367, 426; 832 NW2d 50 (2012) ("The Legislature is presumed to know the law, including decisions of our courts.").

2. Allegations to support a sentence must be proven by the prosecution.

At a sentencing hearing under MCL 769.25, the court must make findings, and is asked to

[23] As there is no court rule of criminal procedure on point, the default rule is that "the rules of civil procedure apply to a criminal case. . . ." See MCR 6.001(D); see also *People v Holtzman*, 234 Mich App 166, 176; 593 NW2d 617 (1999). The Michigan Court Rule on Motion Practice is silent on burden. See MCR 2.119.

"specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." MCL 769.25(7). In other sentencing hearings in Michigan, the prosecutor must prove facts or circumstances supporting the sentence imposed. For example, the Michigan Supreme Court upheld a trial court's sentence because it found the prosecuting attorney established allegations by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 448; 835 NW2d 340 (2013). Additionally, the Court stated that "[the sentence] must be supported by a preponderance of the evidence." *Id.* at 439.

Relatedly, at a probation revocation hearing the court is asked to find facts or circumstance about the alleged violation without the rules of evidence, and the burden is on the government to prove the violation. See MCR 6.445(E)(1) ("The state has the burden of proving a [probation] violation by a preponderance of the evidence."). These analogous hearings demonstrate that the court, in conducting a MCL 769.25 resentencing hearing, must require that the government bear the burden.

B. The government's proposed "no burden, no standard" system is unworkable and invites constitutional error.

The government asserts in its brief that its position is that no one bears the burden in a *Miller* motion and resentencing hearing. Appellee Br at 12. The rest of the government's brief demonstrates with crystal clarity just how unworkable that proposed "standard" would be, as the rest of the brief then places the burden on the defendant. The government, later in the brief, argues that defendant has not "introduced," or "shown" evidence in support of an opportunity be reviewed in his lifetime for possible release. See, e.g., Appellee Br at 16 ("the defense introduced no testimony or evidence at the resentencing hearing demonstrating that the defendant was unusually immature …."); Br at 20 ("at the resentencing hearing, **the defense did not even contest** that the defendant may have been charged with a lesser crime if not for his age."); Br at

22 ("the defense at the *Miller* hearing was entirely unable to introduce any testimony or evidence tending to show that . . .).

This "no burden, no standard" system – which effectively allows individual trial courts in individual cases to choose which side to place the burden on and what standard to impose –is exactly what this Court should not do. A "no burden, no standard" system exacerbates the existing procedural confusion over *Miller* motions and resentencing hearings and invites arbitrary and discriminatory application and the imposition of life without parole in violation of constitutional requirements.

C. The burden of proof must be, at a minimum, clear and convincing evidence.

This Court has left undecided the important question of who bears the burden at a *Miller* hearing. *Skinner*, 917 NW2d at 314.[24] The *Skinner* Court stated in dicta that there is no substantive constitutional presumption against life without parole imposed by *Miller* and *Montgomery*. See *Skinner*, *supra* at 314 ("Similarly, neither *Miller* nor *Montgomery* imposes a presumption *against* life without parole for those juveniles who have been convicted of first-degree murder on either the trial court or the appellate court"). The Court neither reached whether or not there was a procedural presumption – though it inferred there might not be – nor who bore a burden and by what evidentiary standard. The prosecution brief makes a fallacious inference that because this Court previously mentioned a lack of a substantive constitutional presumption that the procedural burden of proof is not born by the government. Appellee Br at 12. Those are two distinct questions. Appellant's brief addresses additional reasons why the

[24] This Court noted that "…there is language in *Montgomery* that suggests that the juvenile offender bears the burden of showing that life without parole is not the appropriate sentence by introducing mitigating evidence." *Id.* ('[P]risoners ... must be given the opportunity to show their crime did not reflect irreparable corruption....')." *Montgomery*, 136 S Ct at 736.

government must bear the burden. This brief now addresses the second question of what standard of proof is required.

Adopting a "standard of proof is more than an empty semantic exercise" (quotation omitted). *Addington v Texas,* 441 US 418, 425; 99 S Ct 1804; 60 L Ed 2d 323 (1979). Instead, the "standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington*, *supra* at 423.[25] As our legislature is silent on the burden of proof in the statute, it is for this Court to prescribe. See, e.g., *Herman & MacLean v Huddleston,* 459 US 375, 389; 103 S Ct 683; 74 L Ed 2d 548 (1983); see also *In re Martin*, 450 Mich 204, 225; 538 NW2d 399 (1995) (deciding the burden of proof necessary when "assessing whether a patient's statements, made while competent, indicate a desire to have treatment withheld," and determining that the correct standard is clear and convincing evidence).

There are three common standards of proof – preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt. In *People v Skinner*, this Court found that the burden of proof was not a beyond a reasonable doubt standard as a matter of constitutional Sixth Amendment law. 502 Mich at 97. Appellant highlights the concerns with this Court's *Skinner* decision and the law and policy that undermine it. See, e.g., Appellant Br at 30 – 31. For these reasons and others, a number of other state high courts have held the prosecution to a beyond a reasonable doubt burden in their hearings under *Miller*.[26]

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[25] See also *In re Winship*, 397 US 358, 370; 90 S Ct 1068; 25 L Ed 2d 368 (1970) (HARLAN, J., concurring) ("the standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he [or she] should have in the correctness of [his or her] factual conclusions").

[26] See, e.g., *Davis v State*, 415 P3d 666, 682; 2018 WY 40 (2018) (state bears burden beyond a reasonable doubt); *Stevens v State*, 422 P3d 741, 750; 2018 OK CR 11 (Okla Crim App, 2018) (government bears burden beyond a reasonable doubt); *Batts*, *supra*, 640 Pa at 476; (government

Amici supports those arguments that a beyond a reasonable doubt standard is supported by both the Sixth Amendment right to a jury trial and by the Eighth Amendment under *Miller v Alabama*, 567 US 460, but does not restate them here. At the other end of the spectrum, a preponderance of the evidence standard is the lowest standard of proof – requiring only that something is more likely than not – and is used in the most everyday civil court decisions in the law. "A preponderance-of-the-evidence standard allows both parties to 'share the risk of error in roughly equal fashion.'" *Herman,* 459 US at 390 (quoting *Addington v Texas, supra* at 423).

In the middle, the Supreme Court of the United States has characterized the "clear and convincing evidence" standard as appropriate where "particularly important individual interests or rights are at stake." *Herman*, *supra* at 389 (allowing a preponderance standard in a securities fraud matter).[27] The use of a heightened standard – even when beyond a reasonable doubt is not imposed – is appropriate when the interests at stake are "more substantial . . . than those involved in a run-of-the-mine civil dispute." *Cruzan by Cruzan v Dir, Mo Dept of Health*, 497 US 261, 283; 110 S Ct 2841; 111 L Ed 2d 224 (1990) ("We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute.").

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bears burden beyond a reasonable doubt); *State v Valencia*, 241 Ariz 206; 386 P3d 392 (2016) (not requiring the sentencer to find "irreparable corruption" and stating that the defendant "will have an opportunity to establish, by a preponderance of the evidence, that their crimes did not reflect irreparable corruption but instead transient immaturity," and are, therefore, unconstitutional); *State v Hart*, 404 SW3d 232, 241 (Mo, 2013) (government bears burden beyond a reasonable doubt).

[27] Citing, as examples, *Santosky v Kramer*, 455 US 745; 102 S Ct 1388; 71 L Ed 2d 599 (1982) (proceeding to terminate parental rights); *Addington v Texas*, *supra* (involuntary commitment proceeding); *Woodby v INS*, 385 US 276, 285-86; 87 S Ct 483; 17 L Ed 2d 362 (1966) (deportation).

The *Miller* motion and sentencing hearing is a quintessential example of a hearing in which "particularly important interests [and] rights are at stake" and an intermediate standard of proof, at a minimum, must be borne by the government.

As stated by Appellant, defendants retain a Due Process right throughout trial and sentencing. See Appellant Br at 28. This right extends through the sentencing proceeding. As the U.S. Supreme Court recently stated in the Sixth Amendment context, "we recognized in *Apprendi* and *Alleyne*, **a 'criminal prosecution' continues and the defendant remains an 'accused'** with all the rights provided by the Sixth Amendment**, until a final sentence is imposed**." *United States v Haymond*, __ US__; 139 S Ct 2369, 2379; 204 L Ed 2d 897 (2019) (finding a Due Process and Sixth Amendment right to a jury finding beyond a reasonable doubt for a revocation of supervised release determination that subjected the defendant to a new mandatory minimum sentence) (emphasis added).

The liberty interest in death in prison for a teenager in a *Miller* motion and sentencing hearing, under the Due Process Clause, requires the application of a heightened standard of review. See *Matthews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976).

The liberty interest at stake is tremendous – the question is whether or not a teenager will spend his or her entire natural life and will, without a chance for parole, die in prison, regardless of whether that individual shows remorse, rehabilitation, or reform. See *id*. (requiring the court to consider "the private interest that will be affected" by government action). As the U.S. Supreme Court stated in *Graham*,

> "life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration…"
>
> *Graham v Florida*, 560 US 48, 69-70; 130 S Ct 2011; 176 L Ed 2d 825 (2010).

In Michigan, which does not have a death penalty, a sentence of life without parole is the ultimate punishment. In these hearings, the sentencer must decide whether or not he may impose this harshest punishment on an individual whom the US. Supreme Court has deemed categorically less morally blameworthy than a similarly-situated adult defendant. See, e.g., *id.* at 69 (noting "twice diminished moral culpability" of a youth who commits a nonhomicide offense).

This Court must also consider the risk of an erroneous deprivation by the trial court of a lifetime of freedom and the hope of living outside of prison and whether greater procedural protections would lessen this risk. See *Matthews*, 424 US at 319 (court must second consider "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"). As the Supreme Court noted in imposing a categorical ban on the death penalty for juveniles in *Roper*, there is a significant risk an individual factfinder, presented only with one homicide case and one defendant at a particular point in time will erroneously impose the harshest sentence available. "An 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," *Roper*, *supra* at 573. This likelihood – exemplified by the Michigan cases on appeal in this Court and the Court of Appeals – must be counterbalanced by a heightened burden of proof. Further, under *Miller* and *Montgomery*, the risk of erroneous lifetime imprisonment has an Eighth Amendment constitutional dimension and cannot be borne by the young person - as these youth have a substantive Eighth Amendment right to not be sentenced to life without parole if they are among the vast majority of youth who have the possibility of rehabilitation. *Miller*, 132 S Ct at 2469; *Montgomery*, 136 S Ct at 726; *Skinner*, 502 Mich at 125. A standard lower than clear and

convincing results in this constitutionally protected youth impermissibly "shar[ing] equally with society the risk of error." *Addington*, 441 US at 427. The Eighth Amendment right at stake in these hearings demands a heightened burden of proof. For example, other states have applied clear and convincing in other situations where there is another constitutional right implicated, as here. *State ex rel Montgomery v Padilla*, 371 P3d 642; 239 Ariz 314 (Ariz App, 2016) (clear and convincing evidence required for state's burden of proving the need for accommodation of a child witness in an abuse case, in part because of the confrontation right implicated).

The weighty interest at stake and the significance of the risk of error in *Miller* motion and resentencing hearings resemble other proceedings in which the U.S. Supreme Court has determined that a clear and convincing evidence standard is necessary. See, e.g., *Santosky v Kramer,* 455 US 745, 758-69; 102 S Ct 1388; 71 L Ed 2d 599 (1982) (termination of parental rights); *Addington, supra* at 427-33 (civil commitment); *Woodby v INS,* 385 US 276, 285–286; 87 S Ct 483; 17 L Ed 2d 362 (1966) (deportation); *Chaunt v United States,* 364 US 350, 353; 81 S Ct 147; 5 L Ed 2d 120 (1960) (denaturalization). Similarly, the federal courts of appeals "overwhelmingly" require the government must bear the burden of proof by clear and convincing evidence when it seeks to forcibly medicate a defendant against her will. See *United States v James*, 938 F3d 719, 721 (CA 5, 2019) (adopting clear and convincing standard as in sister circuits). A number of sister state courts have required this heightened burden of proof be met by the government in proceedings related to Sex Offender Registration Act cases. See, e.g., *Doe v Sex Offender Registry Bd.,* 480 Mass 212, 213–14; 102 NE3d 950 (2018) (finding that due process requires clear and convincing evidence standard, and burden borne by parole board, in termination proceeding); *Noe v Sex Offender Registry Bd*, 480 Mass 195, 207-208; 102 NE3d 409 (2018) requiring clear and convincing evidence in SORA reclassification proceedings); *State*

v Campbell, 436 NJ Super 264, 270; 93 A3d 416 (App Div 2014) (requiring clear and convincing evidence of sexual contact in a registration hearing under the Sex Offender Registration Act); Neb Rev Stat § 29-4003(1)(b)(i)(B); *State v Norman*, 285 Neb 72; 824 NW2d 739 (2013).

When sentencing questions have been deemed weighty – no more true than here – likewise courts have required an intermediate clear and convincing evidence standard. See, e.g., *United States v Valle*, 940 F3d 473, 479 (2019) (requiring clear and convincing for a sentencing guideline enhancement and stating that the "burden of proof for a factual finding underlying a sentencing enhancement under the Sentencing Guidelines depends on the magnitude of the finding's effect on the sentencing range").

The government interests at stake do not argue against a higher standard. See *Matthews*, 424 US at 391. The application of a slightly higher standard of review by the court would have a minimal – if any – impact on the "fiscal and administrative burden," as the evidence is being presented regardless, and clear and convincing evidence is a familiar standard of proof for courts to apply. See *id.* The government has an interest in youth not being unconstitutionally sentenced to life without parole. Additionally, there is not a significant public safety interest as the parole board will evaluate whether or not the prisoner can be safely released into society as a productive citizen after serving decades in prison to pay for his offense. Finally, the government has a fiscal interest in not incarcerating the youth beyond the point at which it serves any legitimate penological purpose.

III. Without Procedural Rules From this Court to Implement the Substantive Guarantee of *Miller* and *Montgomery*, Michigan's Statute Violates the Eighth Amendment and the Due Process Clause.

A. The most fundamental ruling of *Miller* is being ignored by our courts. Children are constitutionally different, and we are bound by *Miller* and *Montgomery* to give mitigating effect to age. This Court must insist that trial courts comply with *Miller* and give mitigating effect to youth.

A hearing at which the trial court gives aggravating consideration to the youthfulness of a child and his "proximity" to 18 – is per se an error of law and an abuse of discretion. See also Appellant Br at 35-40. *Miller* "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." *Montgomery*, 136 S Ct at 734 (quoting *Miller*, 567 US at 472).

The U.S. Supreme Court, in *Roper*, anticipated the unconstitutional trap that our trial courts have fallen into. *Roper*, 543 US at 572-73. Our Michigan courts, presented with only one case and only one individual to be sentenced in a hearing without procedural parameters have, in some instances, ignored the mitigation of youth and, in other instances, like that of Mr. Masalmani, made youth an aggravating factor. The *Roper* Court recognized the "unacceptable likelihood [] that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Roper*, 543 US at 573. *Roper* fretted that "[i]n some cases a defendant's youth may even be counted against him" despite the constitutional requirement otherwise. *Id.* The *Roper* Court chose a categorical ban, but also noted that "this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked." *Id.* This is exactly the rule that the Court must implement now.

This Court must require that lower courts comply with the Constitution and give mitigating effect to youth. The fact that a youth is under 18 at the time of the offense – no matter how close to his 18th birthday – cannot be an aggravating factor under *Miller*. "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account

'how children are different, and how those differences counsel *against* irrevocably sentencing them to a lifetime in prison.'" *Montgomery*, 136 S Ct at 733 (quoting *Miller*) (emphasis added). However, in the case before this Court, Judge Druzinski noted that *Miller* "dealt with juvenile defendants who were a mere 14-years old at the time of their offenses, a far cry from this case." This distinction between the defendant in *Miller* and Mr. Masalmani based solely on their chronological difference in age evidences that Mr. Masalmani's age was not considered mitigating, in direct violation of the mandate in *Miller*. Michigan courts have repeatedly committed this error: the trial courts are giving aggravating effect to the proximity of a 17 year old to his or her 18th birthday[28] or are failing to give mitigating effect to child status because the child before the court is not unusually or exceptionally immature.[29] Social scientists have shown that adolescence lasts well into the early twenties, nonetheless, the U.S. Supreme Court has drawn a line at 18 and considers those under 18 as distinct from adults. *Miller*, 567 US at 465, 471 ("children are constitutionally different from adults for purposes of sentencing"). The

[28] For other examples, see: *People v Hickerson*, 2019 WL 5061189 (Mich Ct App No. 322891) ("It is important to note that defendant was only three weeks away from his 18th birthday when he chose to go forward with the robbery. Had the crime been committed a month later, defendant would have received a mandatory sentence of life without parole, and there would be no further discussion. . . . Logically, it seems unlikely that anything would have changed in the last month or so of defendant's childhood that would have significantly altered his thought process or decision-making with respect to whether to commit such a crime."); *People v McDade*, 2019 WL 286681 (Mich Ct App No. 323614) ("With respect to age, the trial court noted that defendant was only four months shy of being 18 when he committed the offense"); *People v Hyatt (After Remand)*, 2018 WL 6331314 (Mich Ct App No. 325741) ("The trial court observed that while defendant had an unstable family background, he was over seventeen when the crime was committed.") *People v Skinner*, 502 Mich 89; 917 NW2d 85 (2012) (court repeatedly referred to fact that defendant was "27 days shy of her 18th birthday" as evidence of culpability, rather than evidence of capacity for rehabilitation or mitigating effect).

[29] *People v Washington*, 2019 WL 3369770 (Mich Ct App No. 343987) ("Defendant's age at the time of the offense would be a mitigating factor in light of the immaturity, impetuousness, and recklessness often associated with youth. However, there is no evidence that the defendant was immature for his age or that he suffered from a learning disability or emotional impairment.").

features of youth that mitigate their culpability and the ensuing U.S. Supreme Court demand that children be treated differently does not depend on "proximity to 18" or atypicality of the youth. "The 'foundation stone' for Miller's analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles." *Montgomery*, 136 S Ct at 732 (quoting *Miller*, 567 US at 470 n.4).

B. As a matter of Eighth Amendment law, mitigation is a broad concept that encompasses facts beyond the offense of conviction and includes (all) facts about the offender that suggest that he has a lesser moral culpability.

"Mitigation" is not limited to a rationale for a defendant's conduct in committing a crime. Instead, the U.S. Supreme Court has long provided a much broader definition and role for mitigating evidence. In *Lockett v Ohio*, 438 US 586; 98 S Ct 2954; L Ed 973 (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 603-05. The Court emphasized the "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual." *Id.* at 587. 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; L Ed 2d 1 (1982).

This broad understanding of mitigation is necessary so that the youth is sentenced to a constitutionally proportionate sentence. In addition to the *Miller* jurisprudence specific to the ban on unconstitutional life without parole sentences on juveniles described in Appellant's brief, the Eighth Amendment ban on cruel and unusual punishment requires that "all penalties be proportioned to the nature of the offense." *Weems v United States*, 217 US 349, 394; 30 S Ct

544; 54 L Ed 793(1910). Like the federal Constitution, the Michigan Constitution similarly prohibits "cruel or unusual" punishment that is grossly disproportionate. MCLA Const, art 1, 16; *People v Bullock*, 440 Mich 15, 32; 485 NW2d 866 (1992). Individual characteristics of a defendant must be considered to ensure that punishments are "tailored to reflect a defendant's personal responsibility and moral guilt." *Bullock*, 440 Mich at 39 (quoting dissent in *Harmelin v Michigan*, 501 US 957, 1023; 111 S Ct 2680; 2716 L Ed (1991)). Only when a sentence, who is asked to impose a sentence of life without parole, can 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" for a lesser sentence, can the defendant receive a constitutionally proportionate sentence. *Lockett*, 438 US at 603-05.

The consideration, as mitigation, of a broad range of evidence also supports Michigan's non-constitutional requirement of proportionality and individualized sentencing. *People v Milbourn*, 435 Mich 630, 636-51; 461 NW2d 1 (1990) (proportionality analysis "must take into account the nature of the offense and the background of the offender"). As this Court stated in *McFarlin*:

> "[T]he sentence should be tailored to the *particular* circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential…A judge needs complete information to set a proper individualized sentence…[a] host of [other] facts are *essential* to an informed sentencing decision, especially if the offender is a young adult."
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> 389 Mich 557, 574; 208 NW2d 504 (1973) (emphases added).

C. As they have for youth, Michigan courts have failed to give mitigating effect to evidence of childhood trauma, mental illness and potential for rehabilitation, in violation of *Miller*, the Eighth Amendment and the Due Process right to be sentenced on accurate and proven facts.

Instead of using information about youth in mitigation by *Miller*, our courts risk sentencing based on unfounded assumptions and unconstitutionally increasing punishment

absent parameters from this Court about the need to sentence on proven facts and to give mitigating weight to *Miller* evidence. This Court must ensure procedures by which sentences in *Miller* motion hearings and resentences are based on accurate factual information, in compliance with Due Process and the Eighth Amendment. See, e.g., *Townsend v Burke*, 334 US 736, 741; 68 S Ct 1252; 92 L Ed 1690 (1948) ("this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law"); *People v Miles*, 454 Mich 90; 559 NW2d 299 (1997) ("This Court has also repeatedly held that a sentence is invalid if it is based on inaccurate information.").

For example, trial courts err as a matter of law when they use a history of trauma and mental health as justification for imposing a life without parole sentence. *Miller* requires that courts consider the defendant's possibility of rehabilitation as a *mitigating* rather than aggravating factor at sentencing. (emphasis added) *Id.* at 477-78. This is especially important because life without parole sentences "forswear[] altogether the rehabilitative ideal." *Graham,* 560 US at 74. By imposing even a discretionary life without parole sentence which "den[ies] the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society" at odds with a child's capacity for change. *Id.* In Masalmani's case, for example, the court pointed to Masalmani's trauma and mental health problems as foreclosing the possibility of rehabilitation because, it assumed, the Michigan Department of Corrections would not be able to provide Masalmani with the intensive psychological services that he needed. *People v Masalmani*, unpublished opinion per curiam of the Macomb County Circuit Court, November 4, 2010 (Docket No. 09-5244FC). Rather than using information about the individual as a mitigating factor in his sentencing, the court used it

as a means to justify sentencing Masalmani to the harshest possible sentence. Other sentencing cases also discourage the use of mental health as a reason to aggravate a sentence. For example, in *US v Arnold*, the Sixth Circuit held that the lower court abused its discretion when it imposed a higher sentence based upon defendant's possible need for mental health treatment. 630 Fed Appx 432 (2015). Similarly, in *Moses*, the Sixth Circuit, by Judge Boggs, struck down a lower court's sentence in part because it rejected the notion that the presence of mental illness inherently creates an extraordinary danger to the community which justifies a hike in sentencing when there is a post-incarceration commitment statute in place. *United States v Moses*, 106 F3d 1273, 1280 (CTA 6 1997).

In addition to its disregard for *Miller*'s holding and other sentencing law, aggravating a sentence based on mental health– without any evidence that the defendant's mental health will impact the community – risks discriminating against those with mental illness and is not based on reliable evidence, but preconceptions about mental health. Even with the best of intentions, psychiatrists have long noted the challenges in predicting someone's future propensity for violent behavior.[30] There is little reason to believe that judges are better equipped to make such an assessment. The recent resentencing of juvenile lifer David Bennett provides one such example.[31] At the time of his original sentencing, four expert witnesses testified to Bennett's undiagnosed mental illness including schizophrenia and anti-social personality disorder. *Id.* The jury ultimately rejected his plead of insanity, Bennett was found guilty of the murder of Vivian

[30] Erica Beecher-Monas & Edgar Garcia-Rill, Ph.D., *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World*, 24 CARDOZO L REV 1845 (2003).
[31] Allie Gross, *More Than Half of Michigan Juvenile Lifers Still Waiting for Resentencing*, Detroit Free Press, <https://www.freep.com/in-depth/news/local/michigan/2019/08/15/juvenile-lifers-michigan/1370127001/> (last updated August 16, 2019) (accessed January 23, 2020).

Berry and automatically sentenced to life without parole. *Id.* Nearly a half century later, Bennett was resentenced again to life without parole. *Id.* This was despite the fact that Bennett's mental health is stable, so much so that the sole medication he still uses is to treat depression. *Id.* More importantly, as evidence of his rehabilitation, Bennett has not committed a single act of violence in the past 45 years. *Id.* Still, when resentencing Bennett, Judge Dalton Roberson made several comments which indicated that his decision was based upon unsupported assumptions that Mr. Bennett was a danger to society because of his history of mental illness, despite all evidence to the contrary:

> "I read everything three or four times to try and see if there was some way that I could rule in favor of him, but I was just worried about his mental illness, I really was…He takes his medicine as he's required. But it's in a structured environment, where people make sure he's taking the medicine. Once he gets out here, if he gets off that medication, you know he might revert back to the behaviors he experienced when he was attacking that woman...I just wasn't persuaded that he would not revert to his other behaviors if he got back into the community and stopped taking his medication."
>
> *Id.*

Another example is Delilah Evans, an African-American teen in Macomb County who a jury found guilty but mentally ill for the stabbing death of her mother.[32] The *Miller* hearing occurred only a few weeks after the jury verdict and, according to the newspaper report, appeared to have no new expert testimony or mitigation evidence. *Id*. During the hearing, Evans "seemed confused." *Id.* The judge sentenced her to life without parole. *Id.* These cases, and others, show the risk of using *Miller* evidence in aggravation, of making unsupported

[32] Alicia Smith, *Metro Detroit Teen Gets Life Without Parole for Stabbing her Disabled Mom 120 Times, Killing her*, WXYZ DETROIT, <https://www.wxyz.com/news/clinton-township-teen-convicted-of-fatally-stabbing-her-mother-120-times-gets-life-without-parole> (last updated April 5, 2018) (accessed January 23, 2020).

assumptions about abuse and mental illness, and of *Miller* hearing outcomes based on incomplete and unreliable evidence.

D. This Court should take additional steps, such as the automatic appeal of any juvenile LWOP sentence to this Court, to ensure that life without parole sentences for youth are reviewed for arbitrariness, constitutional proportionality, geographic and other disparities.

The uneven geographic distribution and haphazard procedures used in juvenile life without parole sentences in Michigan from court to court lend to a requirement that this Court review all JLWOP sentences imposed to ensure that there is some minimal uniformity and proportionality across the state.

When the U.S. Supreme Court reinstated the death penalty in *Gregg*, a key provision that helped assuage Eighth Amendment concerns was the ability of the state supreme court to review all death sentences to ensure a lack of arbitrariness. "As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases." *Gregg*, 428 US at 198. In light of *Gregg* and the Eighth Amendment, state supreme courts now review death sentences routinely, usually through procedures that grant automatic review.[33] Review by this Court of life without parole sentences would serve a similar

[33] See, e.g., Arizona, (Ariz Rev Stat Ann § 13-703.01(A) (West 2001) (providing automatic state supreme court review of all death sentences); California, (Cal Const art VI, § 11) (providing the state supreme court with appellate jurisdiction in death penalty cases whereas courts of appeals have appellate jurisdiction in all other cases); Florida, (*Profitt v Fla*, 428 US 242, 250; 96 S Ct 2960; 49 L Ed 2d 913 (1976)) (Florida death penalty statute, § 921.141(4) (Supp 1976-1977) (required automatic review by the supreme court for all death

function – to ensure that the implementation of juvenile life without parole is not arbitrary, discriminatory or disproportionate.

CONCLUSION

For the reasons stated above, and for the reasons stated in Appellant's brief, Amici requests this Court to reverse and remand for resentencing under *Miller v. Alabama* and MCL 769.25.

Respectfully submitted,

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sentences); Ohio, (Ohio Rev Code Ann § 2929.05(A) (West 2012)) (stating that the Supreme Court of Ohio "shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases."); Oregon, (Or Rev Stat §_138.012 (2001)) (providing that automatic and direct review in state supreme court of death penalty cases "has priority over all other cases"); Pennsylvania, (42 Pa Const Stat Sec 9711) (requiring state supreme court review); Tennessee, (Tenn Code Ann § 39-13-206(a)(1) (2016)) (providing for automatic review by the state court of criminal appeals and, if the sentence is affirmed, by the state supreme court) and Texas (Crim Proc Code Ann Art 37.071 § 2(h) (Vernon 1981 & Supp 2002)) (providing for "automatic review [of conviction and death sentence] by the Court of Criminal Appeals").

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

SUPREME COURT: 154773
COURT OF APPEAL: 325662
Macomb CC: 2009-005244-FC

v

IHAB MASALMANI,
Defendant-Appellant.

_____/

***AMICUS CURIAE* DEFENDANT-APPELLANT'S APPENDIX**

Unpublished Opinions Cited in Brief

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KeyCite Yellow Flag - Negative Treatment
Distinguished by People v. Bowyer, Mich.App., January 21, 2014

301 Mich.App. 343
Court of Appeals of **Michigan**.
PEOPLE
v.
McDADE.

Docket No. 307597.
|
Submitted June 4, 2013, at Grand Rapids.
|
Decided June 18, 2013, at 9:00 a.m.

Attorneys and Law Firms

****268** Bill Schuette, Attorney General, John J. Bursch, Solicitor General, Jeffrey R. Fink, Prosecuting Attorney, and Cheri L. Bruinsma, Assistant Prosecuting Attorney, for the **people**.

Donald L. Sappanos, for defendant.

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

Opinion

MURPHY, C.J.

***346** Defendant appeals as of right his convictions by a jury of first-degree murder, MCL 750.316, three counts of possession of a firearm during the commission of a felony, MCL 750.227b, two counts of assault with intent to commit murder, MCL 750.83, and carrying a concealed weapon, MCL 750. 227. Defendant was sentenced to mandatory life imprisonment absent the possibility of parole for the first-degree murder conviction, life imprisonment for each of the two assault convictions, 2 ½ to 5 years' imprisonment for the concealed weapon conviction, and 2–year prison terms for the felony-firearm convictions. We affirm defendant's convictions and all his sentences, except for the mandatory life sentence for the murder conviction. Pursuant to *Miller v. Alabama,* 567 U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *People v. Carp,* 298 Mich.App. 472, 828 N.W.2d 685 (2012), and given that defendant was 17 years old at the time of the murder, we vacate the murder sentence and remand for resentencing consistent with the directives in *Miller* and *Carp.*

On July 14, 2010, James Warren went to a store in Kalamazoo where he spoke to defendant about acquiring some marijuana for resale in a profit-sharing arrangement. There was no drug transaction at the store, and instead defendant and Warren proceeded by bicycle to a home on Washington Avenue. Warren knew Lenell Ewell, who was often at the house. Ewell was friends with Carlton Freeman, and Freeman resided in one of the units in the subdivided house. Freeman, Ewell, and a mutual friend, Erick Jenkins, were at the home when defendant and Warren arrived at about 5:30 p.m. According to Warren, defendant gave him some marijuana to sell ****269** and a small amount of cash to make change when Warren sold the marijuana, and Warren rode away on defendant's bicycle, while defendant remained at the ***347** house to await Warren's return.[1] Ewell had indicated that defendant could remain at the location while awaiting Warren's return, which ultimately never did transpire.

Freeman, Jenkins, Ewell, and defendant went into the backyard of the Washington Avenue home after Warren left the premises. Ewell and Jenkins were drinking beer, Freeman was not. Time passed absent Warren's return, and defendant eventually spoke to someone on his cellular telephone. Defendant appeared to become frustrated and started making accusatory statements concerning the other three men. They, however, expressed befuddlement and denied involvement in a scam against defendant. Freeman testified that defendant rejected their denials and remained angry at them. Defendant subsequently walked around to the front of the house where another individual, Marlen Stafford, was waiting. Freeman, Jenkins, and Ewell followed defendant around the house and stepped onto the home's porch, while defendant continued walking to the sidewalk where Stafford was standing. At some point, defendant told the group on the porch that "[h]e wasn't leaving till he got his stuff back." According to Freeman, defendant then took out a revolver and stated that "[s]omebody ... was gonna die[.]" Freeman and Jenkins ran into the backyard and defendant began shooting. Freeman escaped, Jenkins did not. Ewell remained on the porch. He testified that he did not even realize that he had been shot until he heard someone say,

"You got shot—."

***348** Officer Brian Cake was the first officer to respond to the shooting at the home. Cake asked Ewell if the bullet came from a vehicle, and Ewell responded affirmatively. Jenkins was found in the backyard with a single bullet wound to the back. He was pronounced dead shortly thereafter. Officer Joshua Breese spoke with Ewell for about 10 minutes at the hospital on the day of the shooting, and the officer thereafter indicated that Ewell gave him multiple stories about what had happened that day. Detective Harold West also went to see Ewell at the hospital, and the detective described him as being very irritable, still intoxicated, oscillating in emotional intensity, and repeatedly asserting that he did not want treatment and wished to leave. Later in the evening, West showed Ewell a photographic lineup, which included an individual named James Turner, but not defendant. Ewell did not take much time studying the photographs, pointed to Turner's image, and said that he was the shooter.

At some point in the evening of July 14, 2010, Officer Fidel Mireles transported Freeman to the police station to be interviewed. Mireles indicated that Freeman told him that "James" was one of the shooters. Detective Kristin Cole interviewed Freeman later that night and understood Freeman to have meant that "James," meaning James Warren, was merely involved with the shooting. Detective West again met and spoke with Ewell on July 16, 2010. As West entered the room, Ewell, without prompting, blurted out that he, in the prior interview, had ****270** mistakenly identified the wrong person. West showed Ewell a different photographic lineup, which included defendant. West observed Ewell "go over all the photographs, looking at each one ... very, very carefully." Ewell then placed his hand on defendant's photograph and stated, "I got a funny feeling. I don't know why I'm getting this strange ***349** feeling," followed by, "[t]his him. This the guy right there." Afterward, West told Ewell, "good job," but the detective claimed that his remark was merely an interpersonal nicety, not an affirmation of Ewell's identification of defendant. At trial, Ewell again identified defendant as the shooter and claimed that his initial misidentification of Turner was due to fear of reprisal.

On July 19, 2010, Detective Michael Hecht showed Freeman five photographic lineups, which separately included photographs of defendant, Warren, Turner, and Stafford. Freeman identified Warren as the person who originally accompanied defendant to the house, and he identified Stafford as the person who later came to the house and stood next to defendant. Freeman eventually selected defendant as the shooter. Before identifying defendant, Freeman had asked to see additional photographs. With respect to defendant's photograph, Freeman stated, "I want to say it's him" or "[i]t got to be him," among other things. He did not select James Turner. Hecht interviewed Stafford on July 20, 2010, which was Stafford's second interview, and Stafford eventually admitted that he had observed the shooting, identifying defendant as the shooter.

On July 24, 2010, Warren was interviewed by Detective Robert East and was presented a photographic lineup. Warren was not asked to first provide a description of the shooter before reviewing the lineup. Warren told the interviewing detective that he wished to look at a second page of photographs, but there were no other pages available. Detective East admitted that Warren repeated the word "tall" while looking at the lineup, and East acknowledged that because of the composition of the different photographs, defendant's head appeared closer to the top of the picture frame than did the heads of the other persons shown, despite the fact ***350** that defendant was the shortest person in the lineup grouping. At trial, Warren again identified defendant.

Defendant agreed to be interviewed by Detective Hecht on July 27, 2010. He denied involvement with the shooting and claimed to have been at a family barbecue or with a woman. Defendant also provided the police several cellular telephone numbers that he claimed to have used recently. The police, with the assistance of FBI agent Mark Waldvogel, determined that the associated cellular telephone records indicated that one or more of the cellular telephone numbers provided by defendant reflected contacts or communications near Washington Avenue around the time of the shooting.

On October 1, 2010, Detective William Moorian organized a live, corporeal lineup featuring defendant. Warren attended the lineup while drunk and "recognized" a person in the lineup who was not defendant. Ewell and Freeman each viewed the lineup and identified defendant as the shooter.

On October 4, 2010, the day before the preliminary examination was conducted, Ewell contacted Detective Hecht and showed Hecht his cellular telephone, which displayed call logs, including at least one entry from a telephone number belonging to defendant's mother. Ewell had also received a call from a different phone number, with the caller warning Ewell that "[y]ou gonna get

yours," and "[y]ou better watch your back."

**271 As of August 8, 2010, an individual named Shondell Kellumn, along with defendant and Stafford, were all being held in the same jail. Defendant and Kellumn were held in the same cellblock, while Stafford was held in a different cellblock in the same wing of the jail. Stafford asked Deputy Bryan McLain to pass a handwritten note to Kellumn on August 8, which McLain photographed. This first note was addressed *351 to "Dalloc"[2] and stated, "They just came in[,] said if I come to your court day [and] say that you did it they will give me $60,000 to say you did it...." Kellumn later asked McLain to pass a note to Stafford, which McLain also copied. This note read, in part:

> Marlen[:] even if you said something already[,] just don't say nothing when you go to Dallas court date. If you real like you say.... when you get on the stan[d,] just say you don't [know] this man and tell them you was just scared because Duck [Turner] said he was [going to] kill you or something.... Just play that role....

McLain was then asked by Stafford to pass a final note to Kellumn, which was also photographed. This note provided, "I'm goin to court [and] say that," among other things.

Before trial, defendant requested appointment of an expert witness in handwriting analysis to determine whether one of the notes was written by defendant. The trial court denied the motion. At trial, the trial court admitted the three notes into evidence over defendant's objection, after which Kellumn and Stafford were called to the stand, refused to testify, and were then found "unavailable" for purposes of MRE 804 (hearsay exceptions for unavailable declarants). The prosecutor proceeded to move, under MRE 804(b)(6), for the admission of a videotaped recording of Stafford's police interviews, wherein Stafford acknowledged witnessing the shooting and identified defendant as the shooter. In a brief evidentiary hearing outside the presence of the jury, Detective Hecht testified that he spoke with Kellumn, who admitted passing the notes from Stafford to defendant and who further indicated that defendant actually wrote the note that was passed to Stafford. *352 Hecht also stated that the letters were written in "code" to make them sound as if they were written by another person. The trial court admitted Stafford's videotaped interviews, and defendant was ultimately found guilty on all counts.

On appeal, defendant first argues that the three jailhouse notes constituted inadmissible, unauthenticated hearsay, that the admission of Stafford's recorded interviews violated defendant's right of confrontation, and that the trial court erred by refusing to appoint a handwriting expert. We disagree. While a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion, a preliminary or underlying issue of law regarding the admissibility of the evidence, such as whether a rule of evidence bars admission, is reviewed de novo. *People v. Gursky,* 486 Mich. 596, 606, 786 N.W.2d 579 (2010). It is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id.* " 'The decision whether a letter has been properly authenticated for admission into evidence is a matter within the sound discretion of the trial court.' " *People v. Ford,* 262 Mich.App. 443, 460, 687 N.W.2d 119 (2004) (citation omitted). Likewise, "[t]his Court reviews for abuse of discretion a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert witness." *People* **272 *v. Carnicom,* 272 Mich.App. 614, 616, 727 N.W.2d 399 (2006), citing MCL 775.15.

[1] [2] [3] We shall first address the authentication argument. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). An example of authentication or identification that conforms to the requirements of MRE 901(a) is "[t]estimony that a matter is what it is claimed to *353 be." MRE 901(b)(1). "It is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt. It need only meet the minimum requirements for admissibility." *People v. Berkey,* 437 Mich. 40, 52, 467 N.W.2d 6 (1991). Further, "a trial court may consider *any* evidence regardless of that evidence's admissibility at trial, as long as the evidence is not privileged, in determining whether the evidence proffered for admission at trial is admissible." *People v. Barrett,* 480 Mich. 125, 134, 747 N.W.2d 797 (2008). Here, Deputy McLain testified that he passed the notes at issue between Stafford and Kellumn, while Detective Hecht testified that Kellumn had indicated that he passed the notes to and from defendant and that defendant actually wrote the second note. This was sufficient to establish a foundation under MRE 901 for purposes of all three letters. *People v. Roby,* 145 Mich.App. 138, 141, 377 N.W.2d 366 (1985).

[4] [5] [6] [7] We next address the hearsay argument in relationship to the three notes. Hearsay evidence is

inadmissible unless it fits within an exception to the hearsay rule. MRE 802; *People v. McLaughlin,* 258 Mich.App. 635, 651, 672 N.W.2d 860 (2003). The two notes from Stafford were admissible because they were not offered into evidence "to prove the truth of the matter[s] asserted," MRE 801(c), and, assuming the notes constituted hearsay, they would qualify under the exception for statements concerning a declarant's then existing state of mind, MRE 803(3), shedding light on Stafford's intent, plan, and design relative to testifying. In regard to the other note, given the evidence that defendant actually penned the note, it was admissible as an admission by a party opponent, MRE 801(d)(2), and, moreover, the note was not offered to prove the truth of the matter asserted, MRE 801(c). The hearsay argument is unavailing.

[8] [9] [10] ***354** With respect to the Confrontation Clause argument and the playing of Stafford's recorded interviews, we begin by observing the connection between our rules of evidence and the Confrontation Clause analysis. " Controversies over the admission of hearsay statements may also implicate the Confrontation Clause, U.S. Const., Am. VI, which guarantees a criminal defendant the right to confront the witnesses against him or her." *People v. Dendel (On Second Remand),* 289 Mich.App. 445, 452–453, 797 N.W.2d 645 (2010). Under MRE 804(b)(6), if a declarant is unavailable, a court may admit a "statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." MRE 804(b)(6) is "a codification of the common-law equitable doctrine of forfeiture by wrongdoing," and "[u]nder the doctrine, a defendant forfeits his or her constitutional right of confrontation if a witness's absence results from wrongdoing procured by the defendant [.]" *People v. Jones,* 270 Mich.App. 208, 212, 714 N.W.2d 362 (2006) (citations omitted). In *Giles v. California,* 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008), the United States Supreme Court directly addressed the theory of "forfeiture by wrongdoing" for purposes of the Confrontation Clause. The ****273** Court held that the forfeiture rule applies only when the defendant, or an intermediary, engaged in conduct specifically designed to prevent a witness from testifying; there must be an intent to make a witness unavailable. *Id.* at 359–361, 128 S.Ct. 2678.

Here, the note that was passed to Stafford in jail did reflect an effort specifically designed to prevent Stafford from testifying; there was an intent to make him unavailable. The notes from Stafford arguably might suggest that Stafford, on his own volition, did not intend to testify regardless of the note from ***355** Kellumn/defendant. Nevertheless, the note to Stafford was clearly intended or designed to keep Stafford off the witness stand, and one could reasonably infer that Stafford did not testify because of the note. Indeed, the note, in addition to the language already quoted, had language that could be construed as threatening, although indirectly or implicitly so, because it indicated a desire by the writer to beat to death James Turner, referred to as "Duck," followed immediately by a statement that Stafford should expect the prosecution to put him on the stand against defendant. In sum, we hold that the trial court did not err in its ruling under the Confrontation Clause. Additionally, given the multiple identifications of defendant as the perpetrator, along with the circumstantial evidence, any assumed error was harmless beyond a reasonable doubt. *People v. Shepherd,* 472 Mich. 343, 348, 697 N.W.2d 144 (2005) ("Harmless error analysis applies to claims concerning Confrontation Clause errors," but the record must be thoroughly examined "in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error.").

[11] We next address defendant's argument that an expert witness on handwriting should have been appointed, because it was contested whether defendant personally authored any of the notes, and since, without proof of direct authorship, the prosecution could not establish that defendant forfeited his confrontation right with respect to Stafford's police interviews. We disagree. In *Jones,* 270 Mich.App. at 220, 714 N.W.2d 362, the "[d]efendant [took] issue with the fact that the court relied on testimony from [an officer] concerning [a gang member's] threat and the alleged letter from defendant, rather than on direct testimony from [the intimidated witness] or his mother." However, this Court found that ***356** under the circumstances of the case, the lack of direct evidence did not preclude a finding of the defendant's wrongdoing:

> To the extent that the court's finding rested on [the officer]'s credibility, it was a matter for the trial court to decide.... [T]he trial court could infer from the evidence before it that defendant had a role in intimidating or issuing the death

> threat to silence [the intimidated witness].... [*Id.* at 220–221, 714 N.W.2d 362.]

Here, even if expert testimony in this case established that defendant did not put pen to paper, the trial court could still have reasonably found the testimony of Hecht and McLain sufficiently credible to infer that defendant had a role in encouraging Kellumn to write the note to Stafford. Defendant cannot show the necessary nexus between the facts of this case and the need for an expert. *People v. Jacobsen,* 448 Mich. 639, 641, 532 N.W.2d 838 (1995) (no error in denying appointment where expert testimony unlikely to benefit the defendant).

[12] Next, defendant argues that the trial court improperly admitted evidence of various witnesses' identifications of defendant that were based on an unduly suggestive ****274** photographic lineup and that were communicated to the police under unduly suggestive circumstances. We disagree. A trial court's determination in a suppression hearing regarding the admission of identification evidence will generally not be reversed unless clearly erroneous. *People v. Barclay,* 208 Mich.App. 670, 675, 528 N.W.2d 842 (1995). Issues of law relevant to a motion to suppress are reviewed de novo. *People v. Hickman,* 470 Mich. 602, 605, 684 N.W.2d 267 (2004). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Barclay,* 208 Mich.App. at 675, 528 N.W.2d 842.

[13] ***357** A photographic identification procedure or lineup violates due process guarantees when it is so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. *People v. Gray,* 457 Mich. 107, 111, 577 N.W.2d 92 (1998). In *People v. Kurylczyk,* 443 Mich. 289, 311–312, 505 N.W.2d 528 (1993), our Supreme Court stated:

> Like a photographic lineup, the suggestiveness of a corporeal lineup must be examined in light of the totality of the circumstances. As a general rule, "physical differences between a suspect and other lineup participants do not, in and of themselves, constitute impermissible suggestiveness...." Differences among participants in a lineup "are significant only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants in the line-up.... It is then that there exists a substantial likelihood that the differences among line-up participants, rather than recognition of defendant, was the basis of the witness' identification."

> Thus, in *People v. Holmes,* 132 Mich.App. 730, 746, 349 N.W.2d 230 (1984), where the defendant was the second tallest participant in the lineup and heavier than others, the lineup was not impermissibly suggestive because the defendant's appearance was substantially similar to that of the other participants. In *People v. Horton,* 98 Mich.App. 62, 67–68, 296 N.W.2d 184 (1980), the lineup was not impermissibly suggestive despite alleged age and height differences between the defendant and the other participants and despite the fact that the defendant was the only participant with a visibly scarred face. A lineup in which the defendant was the only participant with both a mustache and a goatee was found to be not impermissibly suggestive in *People v. Hughes,* 24 Mich.App. 223, 180 N.W.2d 66 (1970). [Citations omitted; other omissions in original.]

In *People v. Dean,* 103 Mich.App. 1, 10, 302 N.W.2d 317 (1981), this Court observed "that the mere fact that defendant's photograph was taken from a vertical angle ***358** was [not] so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Here, defendant lists a number of differences between defendant and the other individuals included in the photographic array, which defendant claims merits suppression and reversal: the initial array had defendant's picture cropped so that the top of his head appeared closer to the top of the picture frame than did the heads of the other individuals, which was troublesome given that the shooter was described as "tall"; defendant's picture was placed between those of two young men with broader shoulders; three of the individuals had a somewhat darker skin tone; two individuals were wearing an earring; and only three of the individuals had more elongated heads. However, with the exception of the "height" argument, defendant fails to explain how these differences would result in a substantial likelihood of misidentification,

275 as opposed to merely constituting "noticeable" differences. See *Holmes,* 132 Mich.App. at 746, 349 N.W.2d 230. If one were to accept defendant's complaints about the slight physical differences or variations, it would make it nearly impossible for the police to compose a lineup, forcing authorities to search for "twin-like" individuals to match against a defendant. With regard to the arguments concerning height and defendant's image being cropped too high, there was testimony that Warren, and only Warren, referred to the person from whom he had acquired the marijuana as being relatively "tall." We fail to see how this insignificant discrepancy would justify a conclusion that the photographic array was impermissibly suggestive. We hold that the composition of the photographic lineup was not impermissibly suggestive to the extent that it would have given rise to a substantial likelihood of misidentification. Further, in regard to defendant's *359 assertion that the circumstances surrounding the identifications were unduly suggestive, we hold that none of the complained-about circumstances rendered the identifications impermissibly suggestive or otherwise improper. Moreover, given the long period for observation of defendant by the witnesses during the criminal episode and periods of interaction, there existed an independent basis to identify defendant in court. *Gray,* 457 **Mich. at 114–116, 577 N.W.2d 92. Reversal is unwarranted.

[14] [15] [16] Finally, we raise sua sponte a sentencing issue under our authority to "enter any judgment or order or [to] grant further or different relief as the case may require[.]" MCR 7.216(A)(7). In *Miller,* 567 U.S. at ——, 132 S.Ct. at 2460, the United States Supreme Court held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " A court's ability to sentence a defendant to life imprisonment absent the possibility of parole for a crime committed as a juvenile is not foreclosed; however, the court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469. In *Carp,* 298 Mich.App. at 537–538, 828 N.W.2d 685, this Court, examining *Miller,* held:

> The United States Supreme Court has, through a series of recent decisions culminating in *Miller,* indicated that juveniles are subject to different treatment than adults for purposes of sentencing under the Eighth Amendment. Specifically, we hold that in **Michigan** a sentencing court must consider, at the time of sentencing, characteristics associated with youth as identified in *Miller* when determining whether to sentence a juvenile convicted of a homicide offense to life in prison with or without the eligibility for parole....
>
> *360 While *Miller* is applicable to those cases currently pending or on direct review, we find that in accordance with *Teague* [*v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989),] and **Michigan** law that it (1) is not to be applied retroactively to cases on collateral review, such as Carp's, because the decision is procedural and not substantive in nature, and (2) does not comprise a watershed ruling....
>
> In the interim, as guidance for our trial courts for those cases currently in process or on remand following direct appellate review, we find that MCL 791.234(6)(a) [prisoner sentenced to life for first-degree murder is not eligible for parole] is unconstitutional as currently written and applied to juvenile homicide offenders. When sentencing a juvenile, defined now as an individual **276 below 18 years of age for a homicide offense, the sentencing court must, at the time of sentencing, evaluate and review those characteristics of youth and the circumstances of the offense as delineated in *Miller* and this opinion in determining whether following the imposition of a life sentence the juvenile is to be deemed eligible or not eligible for parole. We further hold that the Parole Board must respect the sentencing court's decision by also providing a meaningful determination and review when parole eligibility arises.

Here, the record reflects that defendant was born on November 6, 1992, that the homicide was committed on July 14, 2010, making defendant 17 years old at the time, that defendant was sentenced to mandatory life for the first-degree murder conviction on November 21, 2011, that a claim of appeal was filed by defendant on December 8, 2011, and that defendant's appellate brief, which did not raise any sentencing issues, was filed with this Court on June 14, 2012. *Miller* was issued by the United States Supreme Court on June 25, 2012, and *Carp* was issued by this Court on November 15, 2012. Accordingly, defendant had been sentenced, had filed a claim of appeal, and had submitted his appellate brief all before *Miller* and *Carp* were decided. Because the case was at the stage of direct appellate review in this *361 Court when *Miller* and *Carp* were decided, *Miller* is applicable under the holding in *Carp.* In that procedural

posture, our application of *Miller* does not constitute a collateral attack on the sentence, as opposed to the circumstances in *Carp,* where appellate review by this Court and our Supreme Court had been conducted and completed and the *Miller* argument was subsequently entertained in a motion for relief from judgment. Given the dictates of *Miller* and *Carp* and the Eighth Amendment implications, along with the procedural and factual aspects of the case at bar, we remand for resentencing in regard to the first-degree murder conviction in a manner consistent with *Miller* and *Carp.*

Affirmed in all respects, except that we vacate the sentence for first-degree murder and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

FITZGERALD and HOEKSTRA, JJ., concurred with MURPHY, C.J.

All Citations

301 Mich.App. 343, 836 N.W.2d 266

Footnotes

1 Ewell testified, however, that defendant gave Warren some money to go purchase marijuana for defendant. Freeman testified that he did not know why defendant waited at the house after Warren's departure. With respect to Warren's version of the events, it is unclear where defendant obtained the marijuana that he purportedly gave to Warren for resale.

2 Defendant's first name is "Dallas."

2019 WL 5061189
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of **Michigan**.

PEOPLE of the State of **Michigan**,
Plaintiff-Appellee,
v.
Jonathan Dewig **HICKERSON**,
Defendant-Appellant.

No.
322891
|
October 8, **2019**

Oakland Circuit Court, LC No. 2013-244355-FC

Before: Stephens, P.J., and Servitto and Beckering, JJ.

ON REMAND

Per Curiam.

1** This matter returns to this Court on remand from our Supreme Court for consideration of whether the trial court abused its discretion in sentencing the then 17 year old defendant, Jonathan Dewig **Hickerson**, to life without the possibility of parole for his conviction of first-degree felony murder, MCL 750.316(1)(b). ***People *v.* ***Hickerson***, 503 **Mich**. 912; 919 N.W.2d 787 (2018). We affirm the sentence.

I. BACKGROUND

The defendant was tried with a codefendant, Donald Lee James II (James). The two were sentenced at the same hearing, which was held on July 16, 2014. This Court previously considered defendant's challenges to his convictions and sentences in ***People*** *v. James II*, unpublished per curiam opinion of the Court of Appeals, issued January 21, 2016 (Docket Nos. 322890 and **322891**). Defendant was tried jointly, but before a separate jury, with James for what was a botched home invasion. Defendant, who was roughly three weeks shy of his 18th birthday, initially proposed robbing a home to two other friends, James (then aged 16) and Anthony Herald (Herald) (then aged 17).

At their trial, Herald testified that defendant planned the robbery. Defendant believed the targeted home would have weapons, marijuana, and money inside. Defendant directed both Herald and James as to how to execute the robbery and purchased the ski masks to be worn during the crime. Herald testified to the trio surveilling the home prior to the planned robbery. Herald indicated at that time that he did not want to participate in the crime. Defendant called him a "b****" and later dropped Herald off at his home. Herald testified that he tried to get the defendant and James to abandon the plan. However, the next morning James came to Herald's home and told him that he and defendant "f***ed up" and that defendant had been shot.

The surviving victims of the robbery testified at trial. Megan Contreras (Megan), who was pregnant, testified that she was asleep when she heard a loud noise and saw two men walking into her bedroom. One assailant turned on the light, and she saw both had on black masks. One assailant was holding a large gun. Megan and her husband, Adrian Contreras (Adrian), were told to raise their hands. Megan hid underneath a blanket and then felt someone jump on her stomach and legs. She heard a number of gunshots. After the shooting stopped, she came out from under the blanket and saw Adrian dead on the floor.

David Contreras (David) testified to being awoken by a loud thud. He walked out in the hallway and saw two men in masks. One man shot a rifle at him, but missed. David crawled into a nearby bathroom and heard 10 to 12 more shots. During a quiet moment, David went across the hall to a bedroom where his brother, Brian Contreras (Brian), was located. Brian gave David a pistol while Brian loaded a shotgun. David heard 8 or 10 more shots coming from the rear of the house. Brian jumped out a window and ran to the backyard. David saw an assailant with a rifle in the hallway. David ran into the assailant and knocked him out of the back door to the house and into the backyard. David heard a voice saying, "Don't shoot," followed by several gunshots, and then what sounded like a round

fired from Brian's shotgun. David ran into the backyard and found the assailant, still armed with the rifle. The assailant attempted to fire at David, but the weapon only clicked. David pulled the rifle away from the assailant, punched him, and then saw the assailant's face. David identified defendant as this assailant at trial. David heard another gunshot and saw the second assailant jump over a fence and drive away in a silver car. Brian's testimony was consistent with that of his brother David including the identification of the defendant.

***2** Responding police officers arrested defendant in the backyard of the home. They recovered an AR-15 assault rifle that was on the ground near defendant. A ski mask was recovered from a nearby alley. DNA testing of the mask found a single donor, which was identified as James. James was arrested on October 25, 2012. He was found hiding under a mattress in the basement of his aunt's home in Pontiac. Defendant was convicted by a jury of six counts with the following sentences: first-degree felony murder, MCL 750.316(1)(b), (life without parole); assault with intent to commit murder (AWIM), MCL 750.83, (23 to 50 years); first-degree home invasion, MCL 750.110a(2), (11 to 20 years); and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, (2 years each).

On April 22, 2014, the prosecutor filed a motion seeking a sentence of life without parole pursuant to MCL 769.25. Defendant responded by requesting a hearing to present all facts and evidence that would warrant a term-of-years sentence. On May 29, 2014, the trial court entered an order adjourning sentencing so that a psychological evaluation could be completed. The evaluating doctor was directed to address the relevant factors provided in *Miller v. Alabama*, 567 U.S. 460; 132 S. Ct. 2455; 183 L. Ed. 2d 407 (2012).

Dr. Gerald A. Shiener evaluated defendant and authored a report dated June 11, 2014. Dr. Shiener's report indicated that the defendant gave inconsistent reports regarding the actual crime, finally settling on a version that admitted that he brought the AR-15 rifle with him to the targeted house, and committed the robbery. The bulk of the report detailed the defendant's cacophonous history. Defendant's father, who was 50 years' old when defendant was born, was an alcoholic and his teenaged mother abused narcotics. Defendant's father was never around, and defendant was raised by his mother and grandmother. Defendant was placed in Children's Village at age 14 after he assaulted his stepfather, tried to steal a car, and ran from police. He had assaulted his mother prior to that incident. Defendant threatened to kill himself once in the past. He self-reported that he had used marijuana, ecstasy, Xanax, "Molly," and synthetic marijuana. He had been in psychiatric care since age 14. He received special education services in school and repeated kindergarten and third grade. He had issues in school, including bringing BB guns to school and fighting with other students. He lived in his grandmother's basement, which tended to flood. Defendant reported hallucinations and to having seen Satan. He described an abusive home environment where his grandfather would physically assault defendant's mother. The report then states, "he had a history of car theft 'stealing automobiles to sell to chop shops and selling marijuana. He was said to have a history of fire setting and physical abuse."

Dr. Shiener noted that defendant did not display any "gross disorder of thinking." He also did not appear to have any depression or sadness. His affect remained appropriate. In describing the crime, defendant was concerned with the confidentiality of the interview and how his statements could affect his appeal. Defendant described many incidents that exhibited what Dr. Shiener described as "uninhibited aggression." While reporting hallucinations in the past, defendant did not report presently experiencing any secondary psychotic symptoms. According to Dr. Shiener, defendant did "not show any signs of any cognitive disturbance." With regard to the *Miller* factors, Dr. Shiener explained that defendant's record and character demonstrated disregard for others. His age was nearly 18 at the time of the offenses. He clearly came from a dysfunctional family background. The circumstances of the offense were horrific. While defendant claimed that no one was supposed to get hurt, he came into the home armed and fired the gun when he was confronted. He also disparaged a peer when that individual elected not to participate. With regard to whether defendant could have been charged or convicted of a lesser offense, Dr. Shiener found no "redeeming factors in this area of consideration." With regard to defendant's potential for rehabilitation, Dr. Shiener found that defendant's history and pattern of antisocial behavior showed a "limited" potential for rehabilitation. Dr. Shiener opined that defendant was "not likely to ever gain the degree of self-control and the ability to inhibit impulses that would be necessary for him to live in society without demonstrating the kind of poor impulse control and tendency to impulsive action that leads to the harm of

others." Dr. Shiener additionally noted that defendant's seizure disorder "would also be limiting on [his] rehabilitation potential."

***3** On July 15, 2014, the prosecutor filed a sentencing memorandum explaining why the prosecutor believed a life-without-parole sentence was appropriate. Sentencing for both defendants was conducted on July 16, 2014. James, then aged 16, spoke at sentencing and apologized for his actions. The trial court sentenced James to a term-of-years sentence for his first-degree murder conviction. Defendant, on the other hand, was sentenced to life without parole. The trial court explained that defendant was the leader of the offense, the "star actor of this nightmare." The court noted that defendant had a troubled childhood, several juvenile offenses, and dropped out of school after completing 10th grade. The court believed the crime was committed in a depraved manner. Defendant fired the bullets that killed Adrian. The court also read the portions of Dr. Shiener's report regarding whether defendant could have received a conviction to a lesser offense and his likelihood of rehabilitation, apparently adopting those findings. The trial court then sentenced defendant to life without the possibility of parole for murder.

On appeal, defendant raised two issues: (1) that trial counsel was ineffective for arguing to the jury that defendant was guilty of murder in the second degree and home invasion, and (2) that his life-without-parole sentence was an abuse of the trial court's sentencing discretion under *Miller*. This Court found that counsel was not ineffective given the weight of the evidence against the defendant but agreed that the court erred in the process used to arrive at the life-without-parole sentence. This Court relied on the opinion in ***People*** *v. Skinner*, 312 **Mich**. **App**. 15; 877 N.W.2d 482 (2015), rev'd 502 **Mich**. 89; 917 N.W.2d 292 (2018), in which this Court held that the Sixth Amendment required the question of whether a juvenile should be sentenced to life without parole must be decided by a jury rather than a judge.

The prosecutor appealed, and on May 31, 2017, our Supreme Court held the application in abeyance pending its decision in *Skinner* which was under review at that time. ***People*** *v.* ***Hickerson***, 895 N.W.2d 526 (**Mich**, 2017). On June 20, 2018, our Supreme Court decided *Skinner*, 502 **Mich**. 89. Relevant to this matter, the Court reached two conclusions. First, the Court rejected the notion that a jury must decide whether a juvenile offender receives a sentence of life without parole; rather, it is the trial court's role to make that determination, and doing so does not violate the Sixth Amendment. *Id.* at 96-97. Second, the Court rejected this Court's decision in ***People*** *v. Hyatt*, 316 **Mich**. **App**. 368; 891 N.W.2d 549 (2016), to the extent *Hyatt* imposed a heightened standard of review for such sentences, requiring the trial court to determine whether a juvenile was the rare, incorrigible juvenile discussed in *Miller*. *Skinner*, 502 **Mich**. at 97. Rather, our Supreme Court determined that the proper mode of review on appeal is for an abuse of the trial court's discretion, applying the "traditional abuse-of-discretion standard of review[ ]" discussed in ***People*** *v. Babcock*, 469 **Mich**. 247, 267-270; 666 N.W.2d 231 (2003). *Skinner*, 502 **Mich**. at 97, 127-138.

After releasing *Skinner*, our Supreme Court vacated that portion of this Court's opinion in the instant appeal concerning defendant's sentence and remanded the matter to this Court to "review the defendant's sentence for first-degree murder for an abuse of discretion." ***Hickerson***, 919 N.W.2d at 787-788. The prosecutor filed a supplemental brief on remand.

II. STANDARD OF REVIEW

As was explained in *Skinner*, 502 **Mich**. at 127-132, this Court does not review de novo the trial court's decision to sentence a juvenile offender to life without parole. Rather, this Court must determine whether the trial court abused its discretion using the traditional abuse-of-discretion framework. *Id.* at 132-138. In *Skinner*, the Court quoted *Babcock* (which concerned departures from the sentencing guidelines) for its explanation of the standard:

> [T]he trial court is optimally situated to understand a criminal case and to craft an appropriate sentence for one convicted in such a case ....
>
> ***4** It is clear that the Legislature has imposed on the trial court the responsibility of making difficult decisions concerning criminal sentencing, largely on the basis of what has taken place in its direct observation. Review de novo is a form of review primarily reserved for questions of law, the determination of which is not hindered by the appellate court's distance and separation from the testimony and evidence produced at trial. The application of the statutory sentencing guidelines to the facts is
>
> > not a generally recurring, purely legal matter, such as interpreting a set of legal words, say, those of an

> individual guideline, in order to determine their basic intent. Nor is that question readily resolved by reference to general legal principles and standards alone. Rather, the question at issue grows out of, and is bounded by, case-specific detailed factual circumstances. [*Buford v. United States*, 532 U.S. 59, 65; 121 S. Ct. 1276; 149 L. Ed. 2d 197 (2001).]

Because of the trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case. Accordingly, review de novo, in which a panel of appellate judges could substitute its own judgment for that of the trial court, is surely not the appropriate standard by which to review the determination that a substantial and compelling reason exists to justify a departure from the guidelines range. Instead, the appellate court must accord this determination some degree of deference.

.... At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes ....

Accordingly, the Court of Appeals must determine, upon a review of the record, whether the trial court had a substantial and compelling reason to depart from the guidelines, recognizing that the trial court was in the better position to make such a determination and giving this determination appropriate deference. The deference that is due is an acknowledgment of the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender. The Court of Appeals is to conduct the thorough review required by MCL 769.34(11), honoring the prohibition against departures not grounded in a substantial and compelling reason. MCL 769.34(3). In doing so, however, the Court must proceed with a caution grounded in the inherent limitations of the appellate perspective. [*Skinner*, 502 Mich. at 132-134, quoting *Babcock*, 469 Mich. at 267-270.]

The same analytical framework applies in situations concerning whether a juvenile offender should receive a sentence of life without parole or a term-of-years sentence. *Skinner*, 502 Mich. at 134. "The trial court remains in the best position to determine whether each particular defendant is deserving of life without parole." *Id.* at 137. Thus, "the decision to sentence a juvenile to life without parole is to be made by a judge," and "this decision is to be reviewed under the traditional abuse-of-discretion standard." *Id.*

III. ANALYSIS

***5** There are a number of factors that are to be considered by the trial court when deciding what sentence is appropriate for a juvenile convicted of first-degree murder:

> (1) "his 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 him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "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"; (4) whether "he might have been charged [with] 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 (5) "the possibility of rehabilitation ...." *Miller*, 567 U.S. at 477-478. [*Skinner*, 502 Mich. at 114-115.]

When applied, many of these factors recommend a life sentence without parole for this defendant. It is important to note that defendant was only three weeks away from his 18th birthday when he chose to go forward with the robbery. Had the crime been committed a month later, defendant would have received a mandatory sentence of life without parole, and there would be no further discussion. Cf. MCL 750.316(1)(b); MCL 769.25 and MCL 769.25a. Logically, it seems unlikely that anything would have changed in the last month or so of defendant's childhood that would have significantly altered his thought process or decision-making with respect to whether to commit such a crime.

The circumstances of the crime mediate toward the sentence imposed by the trial court. The defendant was the organizer of the crime. He was clearly aware that the home was occupied and yet, even after one of his cohorts withdrew from the crime, defendant returned that very night to execute the robbery. Either he or his companion brutally assaulted a pregnant woman and shot her spouse as she lay under a blanket next to him. Once out of the home, defendant lay in the grass still attempting to shoot at house occupants exiting the home.

The defendant had been in contact with the juvenile justice system for years. He had been placed under court supervision and in programs aimed at addressing his behavior. Yet rather than stop following the path he was on, defendant's criminal activity escalated. He progressed from truancy, to assault, to stealing motor vehicles, and then finally, to committing an armed robbery of a home known to be occupied and to contain weapons. In the process, defendant ignored the likely consequence—death of a human being, whether himself or anyone else that was inside the home—despite several opportunities to take a second look and abandon the plan. Even despite seeing one of his friends reach the conclusion that the plan was unwise, defendant not only moved forward, but berated his friend for refusing to continue. This set of facts could easily lead one to believe that defendant has little hope of rehabilitation, as the trial court and court-appointed psychologist concluded.

***6** On the other hand, defendant was clearly raised in an environment that was detrimental to him. His mother was a young, drug-addicted parent who was largely absent from his life. His father was several decades senior to his mother, and was also absent for most of defendant's life. Defendant witnessed physical abuse, with his mother being physically abused by her own father. Defendant was raised largely by his grandmother. As the trial court noted, defendant had virtually no proper parentage. Defendant also had mental health problems, including a seizure disorder, and other diagnosed issues, although at the time of his psychological evaluation, the psychologist found little evidence that defendant's thought process was affected by any disorders. Defendant also had his own history of drug use, which could have played into his decision-making process at the time he decided to commit the crimes.

Defendant has argued that his blindness renders him less able to re-offend and infers that he is, therefore, more susceptible to rehabilitation. *Miller* and the statute allow consideration of his physical status when determining a sentence, MCL 769.25(6) (directing the trial court to consider the *Miller* factors and "any other criteria relevant to its decision ...."). Defendant's blindness resulted from injuries sustained during the commission of the crimes for which he was sentenced. We agree that defendant's blindness may make it more difficult for him to commit certain crimes in the future, but it does not necessarily alter his thought processes or proclivity for committing crimes. Nor does it lessen his culpability for the crimes he chose to commit.

In sum, this case presented what was likely a close call for the trial court. An analysis of the *Miller* factors does not clearly preponderate against or in favor of a life-without-parole sentence, nor does it clearly point toward one. Were this Court to engage in a de novo review of the record, perhaps it would reach a different result than the trial court did in this case but, this Court's role is not to engage in a de novo review. Rather, we must review the case for an abuse of discretion. *Skinner*, 502 Mich. at 137. This standard necessarily recognizes that there is a range of possible correct outcomes. *Id.* at 133. The trial court was clearly appraised of the relevant facts, considered them, and reached an outcome falling within that range.

Affirmed

All Citations

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan,
Plaintiff-Appellee,
v.
Kenya Ali HYATT, Defendant-Appellant.

No. 325741
|
December 4, 2018

Genesee Circuit Court, LC No. 13-032654-FC

Before: Cavanagh, P.J., and Jansen and K. F. Kelly, JJ.

ON REMAND

Per Curiam.

***1** This matter returns to us following the Supreme Court's decision in *People v. Skinner*, 502 Mich. 89, 138; 917 N.W.2d 292 (2018), in which the Court held that "the decision to sentence a juvenile to life without parole is to be made by a judge and that decision is to be reviewed under the traditional abuse-of discretion standard." We now affirm Hyatt's life sentence.

Our previous opinion set forth the relevant facts:

> On August 14, 2010, the victim, a security guard at River Village Apartments in Flint, was killed after being shot multiple times. [Floyd Gene] Perkins, [Aaron] Williams and Hyatt each gave statements to police officer Terence Green, and each implicated himself in the murder. The statements revealed that Perkins and his family were in danger because of a dispute Perkins had with an individual. Perkins wanted to obtain a firearm to help him protect his family. Williams and Hyatt were Perkins' cousins, but were not related to one another. The three individuals devised a plan in which Perkins could obtain a gun. Williams lived in the apartment complex where the murder took place and knew that the security guards who worked there were armed. Williams borrowed a gun from an individual known as "Chief." The idea was that Perkins, Hyatt and Williams would use the borrowed gun to rob one of the security guards of his firearm. On the night of the shooting, Williams acted drunk and disorderly in the apartment complex's parking lot in order to lure the victim out of his security car. When the victim approached Williams, Perkins and Hyatt approached from behind. Perkins grabbed the victim and held him while Hyatt drew the gun he had received from Williams. Both Perkins and Hyatt indicated that the victim reached for Hyatt's gun and the gun discharged. After that first shot, Perkins grabbed the victim's side-arm and ran away. Perkins heard additional shots as he was fleeing. Hyatt maintained that the first shot was accidental and that he subsequently "blacked out" and could not remember what happened afterwards. [*People v. Perkins*, 314 Mich. App. 140, 145–146; 885 N.W.2d 900, 907, opinion vacated (Feb. 12, 2016), superseded in part sub nom *People v. Hyatt*, 316 Mich. App. 368; 891 N.W.2d 549 (2016), aff'd in part, rev'd in part sub nom. *People v. Skinner*, 502 Mich. 89; 917 N.W.2d 292 (2018).]

Perkins, Williams, and Hyatt were tried jointly before separate juries and received various sentences. *Id.*at 143. For purposes of this appeal:

> A jury convicted [Hyatt] of first-degree felony murder, conspiracy to commit armed robbery, armed robbery, and felony-firearm. Because Hyatt was 17 years old when the offense occurred, the trial court held a *Miller*[1] hearing to determine Hyatt's sentence. It ultimately sentenced Hyatt to life without the possibility of parole for the murder conviction, 210 months to 40 years' imprisonment for each of the conspiracy to commit armed robbery and armed robbery convictions, and two years' imprisonment for the felony-firearm conviction. [*Perkins*, 314 Mich. App. at 144.]

***2** On appeal to this Court, Hyatt had argued in part that "[i]n light of this Court's decision in *People v. Skinner*, 312 Mich. App. 15; 877 N.W.2d 482 (2015), Hyatt must be resentenced so that a jury may determine whether he should receive life in prison without the possibility of parole." *Perkins*, 314 Mich. App. at 145. In our previous opinion, we reviewed Hyatt's sentence:

> At Hyatt's *Miller* hearing, Officer Terrence Green testified that, unlike the other defendants, Hyatt showed "no remorse, no concern" for what happened. Green acknowledged that the robbery was Perkins' idea and that the other defendants were older than Hyatt. Hyatt's school records revealed assaultive behavior and a threat to "put a cap" in a teacher, resulting in his suspension. A counselor had worried that Hyatt appeared to have no remorse or conscience.
>
> Psychologist Karen Noelle testified that Hyatt had a below average IQ. She testified that Hyatt was a "seriously disturbed young man" with "serious maladjustment" who was "impressionable, easily led, frustrated," depressed, and "caught in a morass of ...conflict." Hyatt reported that his mother, who was a lesbian, preferred "her women and alcohol" over her children. In contrast, Hyatt's father was a "very solid role model" for Hyatt. But Hyatt's father had been shot by intruders and was paralyzed from the chest down. Hyatt believed his father blamed him for the incident and Hyatt also blamed himself. After his father went to a VA hospital in Texas, Hyatt lived with his mother and other family members, though he considered himself homeless.
>
> Noelle believed Hyatt had the intellectual capacity to be rehabilitated. She was "not sure" whether Hyatt was capable of remorse before the incident occurred because he clearly failed to appreciate the consequences of his prior actions. Hyatt was immature and irresponsible. Noelle testified: "I don't know that he has no sense of remorse and no conscience at all ...I do feel that he is not a sensitive, compassionate young man. I do feel that he's pretty disconnected from societal morals and mores. I think that's concerning, yes I do." Noelle testified that she could not predict whether Hyatt was going to change. It would "require extreme effort and dedication on his part." But she could not say that he was "irredeemable." "[I]f I were to predict in five years, it would not be possible."
>
> The sentencing court took the *Miller* factors into consideration at sentencing and concluded "I don't think any factor that I've considered has anything to do with his age." Hyatt's criminal acts were not the result of "impetuosity or recklessness." After extensively reviewing the evidence before it, the sentencing court concluded that "[i]n considering all of that and the nature of the crime itself and the defendant's level of participation as the actual shooter in this case, the principle of proportionality requires this Court to sentence him to life in the State prison without parole. [*Perkins*, 314 Mich. App. at 178–179.]

We noted that "[w]ere it not for *Skinner,* we would affirm the sentencing court's decision to sentence Hyatt to life imprisonment without the possibility of parole. Instead, we are compelled to remand for sentencing consistent with *Skinner.*" [*Id.* (footnote omitted).] Because we are no longer constrained by this Court's decision in *Skinner*, we now affirm defendant's sentence.

***3** At defendant's original sentencing, the trial court noted that *Miller* "requires punishment for crimes to be graduated and proportional to both the offender and the

offense." The trial court considered *Miller's* discussion regarding the possibility that a juvenile's immaturity, underdeveloped sense of responsibility, and background might make him vulnerable to negative influences and outside pressure. Because juvenile characters are not as well formed as adults, the trial court acknowledged its responsibility to consider any mitigating factors. To that end, the trial court considered factors such as defendant's chronological age, character, record, background, mental and emotional development, along with the circumstances of the offense and the extent of defendant's participation. The trial court observed that while defendant had an unstable family background, he was over seventeen when the crime was committed. The trial court gave significant weight to the fact that the crime was "very well planned out" and not "an act of impetuosity or recklessness." Instead, the victim was shot four times and "defendant was the person who shot that gun." The trial court also relied on Dr. Clark's testimony. Ultimately the trial court – after reviewing the records, presentence report, testimony, nature of the crime, and defendant's level of participation as the actual shooter – concluded that defendant should be sentenced to life without parole. Again, had it not been for this Court's decision in *Skinner,* we would have affirmed the trial court's original sentence based on the trial court's well-reasoned analysis.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2018 WL 6331314

Footnotes

1 *Miller v. Alabama*, 567 U.S. 460; 132 S. Ct. 2455, 2457; 183 L.Ed.2d 407 (2012). *Miller* held that mandatory life imprisonment without the possibility of parole for those under the age of 18 at the time they committed the sentencing offense violated the prohibition against cruel and unusual punishment under the Eighth Amendment to the United States Constitution, U.S. Const, Am VIII.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan,
Plaintiff-Appellee,
v.
James WASHINGTON, III, Defendant-Appellant.

No. 343987
|
July 25, 2019

Saginaw Circuit Court, LC No. 99-017628-FC

Before: O'Brien, P.J., and Fort Hood and Cameron, JJ.

Opinion

Per Curiam.

***1** In 2000, defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227(b)(1). Defendant—who was a juvenile at the time—was sentenced to life in prison without parole for the murder and two years' imprisonment for the felony-firearm conviction. Following *Miller v. Alabama*, 567 U.S. 460; 132 S. Ct. 2455; 183 L. Ed. 2d 407 (2012) (which held that imposing mandatory life-without-parole sentences on juvenile offenders violates the Eighth Amendment) and *Montgomery v. Louisiana*, —— U.S. ——*Montgomery v. Louisiana*, —— U.S. ——; 136 S. Ct. 718; 193 L. Ed. 2d 599 (2016) (which held that *Miller* applies retroactively) the Michigan Supreme Court vacated defendant's sentence for life without parole, and remanded to the trial court for resentencing. *People v. Washington*, 499 Mich. 909 (2016). On remand, the trial court sentenced defendant under MCL 769.25a to 40 to 60 years' imprisonment for his murder conviction. We affirm.

I. BACKGROUND

At defendant's resentencing hearing, the trial court described the events that led to defendant's conviction as follows:

> This homicide was a premeditated execution-style killing over a drug debt. Defendant was a drug dealer at the time of the murder, and the victim was a customer who allegedly owed defendant money.
>
> In the late hours of June 26, 1999, two 13-year-old boys were visiting defendant who supplied them with drugs and alcohol. In the hours leading up to the murder, defendant asked his younger visitors if they wanted to see someone get shot and killed. Later on, as the two boys were sleeping, defendant woke them up and told them it was time for the killing.
>
> The defendant then lured the victim and another adult male, [Robert] Corcoran, to his home under the guise of a drug transaction. When the two men arrived in the defendant's driveway, the defendant directed them into the back yard. Defendant then turned back to his younger friends and asked if they were ready. After that, the defendant pulled a gun from his waistband and pulled the trigger. The gun initially misfired, but defendant pulled the trigger again and shot [the victim] in the head.
>
> After [the victim] fell to the ground, the defendant walked over and shot him again. He later told his younger companions, that is how you kill someone. ....
>
> Defendant then ordered Corcoran to move [the victim's] body. Corcoran grabbed [the victim's] legs and pulled him into an area of flowers and shrubs, partially concealing [the victim's] body. Defendant took Corcoran's identification, told Corcoran that he knew where he lived, and that the same thing would happen to him if he told anyone about the murder.
>
> The defendant then yelled for his neighbor, [Steve] Smith, because he wanted Smith to help him dispose of [the victim's] body. A Buick, driven by Beauford Adkins, a relative of the defendant's, backed into defendant's driveway. Defendant, Smith, and Adkins wrapped [the victim's] body in a sleeping bag and

> blanket and loaded it into the trunk. Adkins and Smith drove to a rural area in Gladwin County, where they left [the victim's] body in the woods.
>
> ***2** Corcoran later called the police and reported that he had witnessed a homicide in Saginaw. He explained the reason that so many people were involved was because the defendant was on electronic monitoring and could not leave his residence.

On remand, the trial court heard statements from defendant, his counsel, and the victim's family. Following these statements, the trial court delivered its ruling from the bench. It discussed at length the factors from *Miller* and *People v. Snow*, 386 Mich. 586, 592; 194 N.W.2d 314 (1972), and explained how each factor weighed into its decision. After explaining its reasoning, the trial court sentenced defendant to 40 to 60 years' imprisonment for the murder conviction.

Defendant now argues that the trial court failed to correctly apply the *Miller* factors. He maintains that the court only gave minimal consideration to how defendant was affected by his youthfulness at the time of the offense; abused its discretion by relying on information that was not contained in the lower court record; failed to adequately consider the extent of defendant's rehabilitation; and ultimately imposed a de facto life sentence. We disagree.

II. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision to sentence defendant under MCL 769.25a to 40 to 60 years' imprisonment. See *People v. Skinner*, 502 Mich. 89, 131; 917 N.W.2d 292 (2018). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Id.* at 133 (quotation marks and citation omitted).

III. *MILLER* AND ITS PROGENY

After *Miller* held mandatory life-without-parole sentences for juvenile offenders to be unconstitutional, but before *Montgomery* declared *Miller* retroactive, our Legislature enacted MCL 769.25a, which was to apply if *Miller* was determined to apply retroactively. See *People v. Wiley*, 324 Mich. App. 130, 137; 919 N.W.2d 802 (2018). Because *Montgomery* declared *Miller* retroactive, MCL 769.25a applies. That statute sets forth the procedure for resentencing criminal defendants under *Miller* when the case is final. As relevant here, MCL 769.25a allows the trial court to resentence those juvenile offenders originally sentenced to life without parole to a term of years "for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years." MCL 769.25a(4)(c).

In *Miller*, the United States Supreme Court held that judges or juries sentencing juvenile offenders "must have the opportunity to consider mitigating circumstances" before sentencing juveniles to a sentence of life without the possibility of parole. *Id.* at 489. In *Skinner*, our Supreme Court enumerated these mitigating factors as follows:

> (1) "his 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 him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "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"; (4) whether "he might have been charged [with] 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 (5) "the possibility of rehabilitation ...." [*Skinner*, 502 Mich. at 114-115, quoting *Miller*, 567 U.S. at 477-478.]

***3** In *People v. Wines*, 323 Mich. App. 343, 352; 916 N.W.2d 855 (2018), this Court held that *Miller* "does not constitutionally compel a sentencing judge to consider only the factors defined in *Miller* when the sentence of life imprisonment without parole is not sought by the prosecution per MCL 769.25a," as is the case here. Yet the *Wines* Court held that trial courts must still "consider the distinctive attributes of youth, such as those discussed in *Miller*," when sentencing a defendant to a term of years under MCL 769.25a. *Id.* at 352. The *Wines* Court reasoned that, based on *Snow*, 386 Mich. at 592, a sentencing court should balance "(1) reformation

of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses," and that these can only be properly balanced "in the case of a [juvenile] defendant" by considering "the distinctive attributes of youth." *Wines*, 323 Mich. App. at 351-352.

IV. DEFENDANT'S YOUTHFULNESS

Defendant first argues that the trial court incorrectly applied the *Miller* factors in determining the extent to which defendant was affected by his chronological age and its hallmark features. We disagree.

When sentencing defendant, the trial court reasoned:

> *Miller* instructs the Court to consider the character and record of the individual offender as well as the offender's chronological age at the time of the offense. The defendant here was 17 when he committed this murder. Prior to his 17th birthday, the defendant amassed a significant juvenile justice history, including a 1994 larceny from a person, which resulted in a warning, and two 1996 adjudications for assault with intent to do great bodily harm less than murder. As a result of the assault adjudications, the defendant spent approximately two years in a juvenile detention facility before he was released to his mother's custody in 1998.
>
> Almost immediately after his 17th birthday, defendant became involved in the adult criminal justice system. On April 25, 1999, he was charged with assault with intent to do great bodily harm, operating under the influence of liquor, minor in possession, driving while license suspended, and having improper plates. The defendant was on electronic monitoring as a condition of his bond in the assault case when he murdered the victim on June 27, 1999.
>
> Defendant's age at the time of the offense would be a mitigating factor in light of the immaturity, impetuousness, and recklessness often associated with youth. However, there's no evidence that the defendant was immature for his age or that he suffered from a learning disability or emotional impairment. Rather, the record indicates that the defendant was a relatively bright teenager who was able to earn his GED in 1997 while in juvenile placement. Additionally, the Court finds the defendant's significant juvenile justice history and his prior involvement in the adult criminal justice system to be aggravating factors in terms of his sentencing.

Contrary to defendant's position, the trial court appropriately weighed defendant's age and the characteristics that often accompany young age—such as immaturity, impetuousness, and recklessness—when sentencing defendant. The trial court explicitly recognized this mitigating factor and explained, in detail, why the factor did not justify a lower sentence. Defendant appears to argue that *Miller* mandates that a juvenile offender's chronological age and its hallmark features always justify a lower sentence. But that is not what *Miller* held; *Miller* required that sentencing courts "have *the opportunity to consider* mitigating" factors such as the hallmark features of youth. *Miller*, 567 U.S. at 489 (emphasis added). The trial court had the opportunity to—and did—consider this factor, and decided that it justified a lower sentence in defendant's case. The trial court gave a reasonable and principled explanation for this decision, so we conclude that the trial court did not abuse its discretion. *Skinner*, 502 Mich. at 133.[1]

V. FACTS NOT IN THE RECORD

***4** Next, defendant argues that the trial court abused its discretion when sentencing him because it relied on information that was not in the record and did not provide defendant an opportunity to refute that information.

The portion of defendant's sentencing that he argues was not in the record occurred while the trial court was reciting the factual basis for defendant's conviction. The trial court stated:

> After [the victim] fell to the ground, defendant walked over and shot him again. He later told his younger companions, that is how you kill someone. *By the way, both of these boys went on to be involved in the criminal justice system themselves, one of them for murder*. [Emphasis added.]

Defendant is correct that the italicized portion is not in the record. Yet there is nothing to suggest that the trial court relied on this information when sentencing defendant.

Again, the trial court noted this information while it was establishing the factual basis for defendant's conviction, and it appears to be nothing more than an aside. The whole of the trial court's reasoning for defendant's sentence spans 12 pages of transcript. In those 12 pages, the trial court explains the numerous factors that it considered to justify defendant's sentence. There is nothing in those 12 pages to suggest that the trial court considered this information when determining defendant's ultimate sentence. Accordingly, defendant has not established any error warranting resentencing.

VI. REHABILITATION

Defendant argues that the trial court erred when it resentenced him to a minimum 40-year term for his murder conviction because his self-reformation and rehabilitation during his years of incarceration should have "strongly" mitigated his sentence. We disagree.

The Court acknowledged at length that, since 2007, defendant's behavior in prison was positive:

> [T]he Court acknowledges that the defendant has shown considerable improvement in his attitude and behavior since 2007, when his mother passed away. After his mother's death, the defendant accepted responsibility for this murder and expressed remorse for his actions.
>
> He has also completed all of his program recommendations in prison, including anger management, behavioral modification, substance abuse, and self-help programs. He has also taken college classes offered through Central Michigan University and Saginaw Valley State University.
>
> He has also become a mentor in two programs, Youth Deterrent and Common Ground. Probation Officers Kila Thomas, Roger Foster, and Barbara Beekman have all provided statements verifying the defendant's positive contributions to the Youth Deterrent program. Daryle Walton has also provided an email detailing defendant's effectiveness as a mentor in both programs.
>
> The defendant also has a solid prison work history. Since 2011, he has received 363 positive work evaluations, and has been assigned as a unit porter. Also, since 2011, he has been consistently housed in Level II, which is the lowest level security that can be achieved by prisoners sentenced to life.
>
> Based on his positive behavior since 2007, the Court is hopeful that the defendant will develop the tools necessary to function as a productive, nonviolent, law-abiding citizen if he is granted the opportunity for parole in the future.

***5** Yet, in spite of his positive behavior since 2007, the trial court expressed reservations about defendant's potential for rehabilitation:

> The brutal nature of this offense, the defendant's extensive criminal behavior predating this offense, and his consistent denial of responsibility for this murder for many years after his conviction are all factors that cause the Court concern relative to his potential for rehabilitation.
>
> In addition, the defendant has accrued 12 prison misconducts during his nearly 19 years of incarceration. Defendant's most serious misconducts include assault and battery, fighting, threatening behavior, possession of a weapon, and assault resulting in serious injury to a prisoner.

We disagree with defendant that the trial court "minimiz[ed]" his rehabilitation. To the contrary, the trial court acknowledged defendant's progress at length, noting not only the programs that he has participated in, but the positive impressions that he left on the people running those programs. While defendant would have preferred the trial court to only look at his record since his 2007, the trial court instead reviewed the totality of defendant's prison record, and connected that to the earlier failures to rehabilitate defendant. The trial court thus took a holistic approach to considering defendant's potential for rehabilitation, and found that, when not focusing only on defendant's positive improvements, there was reason for concern. This conclusion was within the range of reasonable and principled decisions, and therefore the trial court did not abuse its discretion. *Skinner*, 502 Mich. at 133.

VI. DE FACTO LIFE SENTENCE

Lastly, defendant argues that the trial court abused its discretion in sentencing him to 40 to 60 years' imprisonment because, given the reduced life expectancy of prisoners, the sentence amounted to a de facto life sentence. Yet defendant cites no authority, binding or otherwise, for his assertion that a 40-year sentence amounts to a de facto life sentence. And even if he did,

defendant does not explain how the trial court's sentence was in error; defendant does not argue that the sentence violates the principle of proportionality, nor does he contend that the sentence violated *Miller*.[2] In short, defendant's argument does not present any ground for relief.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2019 WL 3369770

Footnotes

1 As part of defendant's argument that the trial court abused its discretion by not properly weighing his chronological age, defendant references difficulties he experienced in his family and home environments leading up to the crime. In a different portion of the trial court's oral opinion, it separately considered defendant's family and home environments, and concluded that it was a mitigating factor.

2 Defendant contends that a de facto life sentence would not "meaningfully" apply *Miller* to him because *Miller* requires that a juvenile defendant have "some meaningful opportunity to obtain release ...." *Miller*, 567 U.S. at 479 (quotation marks and citation omitted). We note, however, that *Miller* prefaced that statement with, "A state is not required to guarantee eventual freedom[.]" *Id.* (quotation marks and citation omitted). This Court recently held that a defendant sentenced to life with the possibility of parole has some meaningful opportunity to obtain release, see *People v. Williams*, 326 Mich. App. 514, 522; 928 N.W.2d 319 (2018), and we see no reason why defendant's 40 to 60-year sentence does not present the same opportunity.

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