STATE OF MICHIGAN

IN THE SUPREME COURT

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

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

IHAB MASALMANI,

Defendant-Appellant.
_____/

Supreme Court No. 154773

Court of Appeals No. 325662

Circuit Court No. 09-5244FC

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Ihab Masalmani's Reply Brief

Oral Argument Requested

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Table of Contents

Index of Authorities i

Reply 1

I. The government must bear the burden of proof at a *Miller* hearing, consistent with juveniles' state and federal constitutional rights to due process and to be free from cruel and/or unusual punishment..... 1

Request for Relief.....10

Index of Authorities

Cases

Caruso v Weber, 257 Mich 333; 241 NW 198 (1931) 2, 5

In re Mardigian Estate, 502 Mich 154; 917 NW2d 325 (2018) 6

Miller v Alabama, 567 US 456; 132 S Ct 2455 (2012) ..... passim

Montgomery v Louisiana, __ US __; 136 S Ct 718 (2016) ..... passim

People v Carpentier, 446 Mich 19; 521 NW2d 195 (1994) 2, 6

People v Cash, 419 Mich 230; 351 NW2d 822 (1984) 5, 6

People v Gahan, 456 Mich 264; 571 NW2d 503 (1997) 2, 4

People v Gardner, 482 Mich 41; 753 NW2d 78 (1999) 5

People v Norfleet, 317 Mich App 649; 897 NW2d 195 (2016) 2

People v Skinner, 502 Mich 89; 917 NW2d 292 (2018) 4

Washington v Texas, 388 US 14; 87 S Ct 1920 (1967) 4

Statutes and Court Rules

MCL 769.25 ..... passim

MCL 769.25a 4, 5

MRE 301 6

MRE 302 6

Other Authorities

2 McCormick On Evid § 343 6

Reply

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

The government asserts that neither party bears a burden of proof at a *Miller*[1] hearing. The government fails to cite any authority in support of its position. Instead, it argues that because *Miller* and Michigan's related statutory scheme are silent on the matter, neither party bears a burden of proof. Government's Brief on Appeal, 12/16/19 at 11-12. This position is not consistent with or supported by Michigan's sentencing jurisprudence.[2] Nothing in *Miller* or Michigan's related statutory scheme suggests an intent to shift the burden of proof to juveniles who previously received unconstitutional sentences. Nor should this Court interpret the Legislature's silence on burden as adopting the novel rule that no party bears the burden. Doing so would violate the due process rights of juveniles being resentenced pursuant to *Miller* and *Montgomery*[3]. Adopting the government's position would result in *Miller* hearings that are fundamentally unfair and unlikely to ensure reliable and consistent sentencing decisions.

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[1] See *Miller v Alabama*, 567 US 4560; 132 S Ct 2455 (2012).

[2] Mr. Masalmani maintains that the government's position is also at odds with juveniles' due process rights, as discussed in his Brief on Appeal. Mr. Masalmani's Brief on Appeal, 9/6/19 at 27-28.

[3] See *Montgomery v Louisiana*, __ US __; 136 S Ct 718 (2016).

A. Michigan's jurisprudence establishes a general rule that the moving party bears the burden of supporting its request. In criminal sentencing proceedings, the proponent generally bears the burden of proof regarding factual information relied upon by the sentencing court.

As discussed in Mr. Masalmani's Brief on Appeal the moving party generally carries the burden of proof related to its request. *Caruso v Weber*, 257 Mich 333, 334; 241 NW 198 (1931); see Mr. Masalmani's Brief on Appeal, 9/6/19 at 20-22. In this case, the government is the moving party.

In the context of criminal sentencing, the proponent generally bears the burden of proof with respect to the facts supporting a sentencing decision. In Michigan, a court's sentencing discretion is guided by the evidence before it and the factual findings made based upon that evidence. In general, once challenged, the proponent bears the burden of proof as to those underlying facts. E.g. *People v Norfleet,* 317 Mich App 649, 669; 897 NW2d 195 (2016) (the government bears the burden of proving challenged facts contained in the presentence report); *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997) (the government bears the burden of establishing the proper amount of restitution), overruled on other grounds in *People v McKinley*, 496 Mich 410; 852 NW2d 770.[4]

The government asserts that, "[t]raditionally, in the State of Michigan, neither party carries a burden of proof regarding the trial court's imposition of sentence." Government's

[4] One situation where defendants bear a burden of production at sentencing occurs when defendants assert at sentencing that a prior conviction was obtained in violation of the right to counsel. See *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994). In that situation, this Court found it appropriate to allocate the initial burden of production to defendants because the assertion is in effect a collateral challenge to a prior conviction and consistent with the court rules placing the burden on defendants pursuing collateral challenges. *Id.* at 36-38. However, once the defendant meets that initial burden of production, the government bears the burden of persuasion. *Id.* at 31.

Brief on Appeal, 12/16/19 at 12. It does not support its assertion with any authority. While the ultimate imposition of sentence is within the sentencing court's discretion, the government disregards the many situations in which the government does bear a burden at sentencing, like when the defense challenges the accuracy of information in the presentence report, *Norfleet,* 317 Mich App at 669, or challenges the restitution amount, *Gahan,* 456 Mich at 276. And those situations are directly relevant to the questions asked by this Court.[5] The question of whether a *Miller* factor does or does not suggest a LWOP sentence is necessarily a question involving preliminary determinations of fact, about which the government must bear a burden of proof, just as it would in any other sentencing context.

B. Nothing in *Miller* or *Montgomery* alter the ordinary allocation of burden of proof at sentencing.

The *Miller* and *Montgomery* decisions did not place a burden on juveniles to prove that particular *Miller* factors do or do not support LWOP sentences, nor should they be interpreted to have done so. The *Miller* decision announced a substantive rule of law and the *Montgomery* decision announced that *Miller* applies retroactively. See *Miller*, 567 US 460; *Montgomery*, 136 S Ct 718. Neither opinion made any effort at establishing procedures for

[5] In its brief, Amicus Curiae, the Prosecuting Attorneys Association of Michigan, makes a similar misstep in responding to this Court's questions. See Prosecuting Attorneys Association of Michigan's Brief, 1/6/20 at 9-10. It continuously asserts that neither party bears a burden of proof as to the sentence imposed but overlooks the necessary preliminary findings of fact that are required and are the subject of this Court's order granting leave to appeal. The finding of facts required under MCL 769.25(7) and manner in which those findings are to guide the court's sentencing discretion make a *Miller* hearing more akin to the "eligibility phase" of a death penalty sentencing rather than the "selection phase." As such, a *Miller* hearing must include similar procedural protections to ensure that *Miller* hearings are fundamentally fair and to avoid arbitrary and lawless results. The analogy to the "selection phase" of a death penalty hearing is inapposite.

sentencings and resentencings held pursuant to the rule they articulated. Those procedures were left for states to implement in accordance with their jurisprudence. *Id.* at 735.

In its brief, the government cherry-picks language in *Miller* and *Montgomery* that take issue with mandatory sentencing schemes requiring the imposition of LWOP on juveniles because they deprive juveniles of the "opportunity" to "present" mitigating evidence or "show" that their crimes do not reflect irreparable corruption. Government's Brief on Appeal, 12/16/2019 at 11-12. It characterizes this language as "allud[ing] to a burden of proof." *Id.* Similarly, this Court observed in *Skinner* that this language "suggests" juveniles bear some burden of proof.[6] See *People v Skinner,* 502 Mich 89, 131; 917 NW2d 292 (2018). This characterization overstates the significance of this language in the *Miller* and *Montgomery* decisions.

Both decisions recognize that juveniles would have a due process right to present mitigating evidence at a *Miller* hearing, much like a defendant has the right to present mitigating evidence at any other sentencing hearing. However, that does not mean a juvenile *must* present evidence, nor does it mean that a juvenile must bear the burden of disproving the government's asserted basis for seeking LWOP.[7]

The language in *Miller* and *Montgomery* acknowledging that juveniles must have the opportunity to present mitigating evidence should not be interpreted as establishing any sort of burden.

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[6] Similarly, Amicus Curiae, the Prosecuting Attorneys Association of Michigan, argues that this language suggests juveniles bear a burden of production at *Miller* hearings. See Prosecuting Attorneys Association of Michigan's Brief, 1/6/20 at 6-7.

[7] Along those same lines, a defendant has the right to present evidence at trial, *Washington v Texas,* 388 US 14, 19; 87 S Ct 1920 (1967), but it remains the government's burden to prove guilt, regardless of whether the defendant chooses to exercise that right.

C. Michigan's statutory scheme establishes procedures for *Miller* hearings, but is silent on who bears the burden of proof. This Court should not read that silence as establishing a novel allocation of burden at sentencing.

When the Legislature enacted MCL 769.25 and MCL 769.25a to effectuate *Miller's* mandate, it included several provisions specifying how *Miller* hearings should be held. E.g. MCL 769.25(3); MCL 769.25(5). Nowhere in the many provisions of that statutory scheme does the Legislature assign burden of proof to a particular party. The government suggests this silence should be interpreted as an intent to establish the novel rule that there is no burden of proof at sentencing. See Government's Brief on Appeal, 12/16/19 at 11-12. This Court should reject that argument. *People v Gardner*, 482 Mich 41, 58-59; 753 NW2d 78 (1999). "[S]ound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence." *Id.* (citations and quotations omitted).

This is especially so where other provisions of the statute establish the government as the moving party, MCL 769.25(3); MCL 769.25a(4)(b), who traditionally bears the burden of proof regarding its request, *Caruso*, 257 Mich at 334. If anything, this Court should presume the Legislature was familiar with that aspect of Michigan's jurisprudence when it designated the government as the movant and when it declined to include express language in MCL 769.25 and MCL 769.25a allocating burden of proof. *People v Cash*, 419 Mich 230, 241; 351 NW2d 822 (1984) ("[A] general rule of statutory construction is that the Legislature is 'presumed to know of and legislate in harmony with existing laws.'") (citations and quotations omitted).

D. Burdens and presumptions are distinct legal concepts that serve different purposes. This Court's conclusion that there is no presumption against LWOP sentences for juveniles is consistent with the government bearing the burden of proving its motion seeking LWOP is supported.

The government asserts that this Court's decision in *Skinner*, rejecting a presumption against LWOP for juveniles, further supports its position that there is no burden at a *Miller* hearing. See Government's Brief on Appeal, 12/16/19 at 12-13. This argument conflates the concepts of 'burden' and 'presumption.'

Burdens and presumptions are distinct legal concepts. A presumption is "[a] legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts." Black's Law Dictionary (11th ed 2019). Most presumptions call for a certain result in a given set of circumstances unless the adversely affected party overcomes it with other evidence. *Id.* There are many purposes that can be served by presumptions, including ensuring procedural fairness, efficiency, and serving public policy. See 2 McCormick On Evid § 343 (8th ed).

Presumptions can function as a tool to shift burdens from one party to the other. E.g. *People v Carpentier,* 446 Mich 19, 31; 521 NW2d 195 (where defendant makes prima facie showing that a prior conviction was obtained in violation of the right to counsel, the burden shifts to the government to establish the constitutional validity of the prior conviction). In Michigan, presumptions can, but do not always, shift the ultimate burden of proof. E.g. *In re Mardigian Estate*, 502 Mich 154, 163-164; 917 NW2d 325 (2018); MRE 301; MRE 302.

In contrast, the burden of proof is "[a] party's duty to prove a disputed assertion or charge," and includes the burden of production and the burden of persuasion. Black's Law Dictionary (11th ed 2019). While a presumption can have the effect of shifting the burden of

production or persuasion from one party to another, the fact that this Court found there was no presumption against LWOP for juveniles does not imply anything with respect to which party bears the burden of proving that a *Miller* factor does or does not support a LWOP sentence.

E. Even though the sentencing court did not state it was placing the burden on the defense, its findings show that it did.

The government asserts that the trial court did not impose a burden of proof on either party at the *Miller* hearing. However, the record shows that the trial court erroneously placed the burden of proof on Mr. Masalmani, both in how it conducted the *Miller* hearing and in how it analyzed the evidence presented.

Even though the *Miller* hearing was based on the government's motion seeking a LWOP sentence (Appendix, 39a-49a), the trial court directed Mr. Masalmani's counsel to begin the hearing with opening remarks. (Appendix, 56a). Then, Mr. Masalmani presented testimony from several witnesses and record evidence of:

- His "[c]haotic" and "[t]raumatic" childhood (Appendix, 132a);
- His relative immaturity for his age (Appendix, 158a-159a);
- His acceptance of responsibility for the offenses he committed (Appendix, 324a); and
- The significant progress he made towards rehabilitation during the first five years of his incarceration (Appendix, 238a-240a)

In addition, Mr. Masalmani presented expert opinion testimony that he possesses the capacity for change and rehabilitation. (Appendix, 232a-233a, 245a-246a).

After the defense "rested," the government presented no testimony, but admitted records from Mr. Masalmani's childhood, criminal case, and prison record. (Appendix, 264a-265a). It did not present any expert opinions from prior to the time of trial.

At the conclusion of the hearing, the trial court directed Mr. Masalmani's counsel to present her closing argument first. (Appendix, 268a).

In its opinion, the trial court repeatedly pointed to a lack of evidence as it considered the *Miller* factors:

- **"There was nothing in the testimony or evidence presented** which suggests that treating defendant differently from an 18 year old would be warranted in this case." (Appendix, 365a) (emphasis added).
- **"There was no evidence that** any of defendant's criminal activity was precipitated by peer or family pressure." (Appendix 367a) (emphasis added).
- **"There is nothing in the facts and circumstances of the crime** which would warrant anything less than life in prison without the possibility of parole." (Appendix 367a) (emphasis added).
- **"Next, there was no evidence that** the incapacities of youth caused defendant to be unable to participate in his defense. Nor is there any evidence that defendant implicated himself due to youthful incapacities." (Appendix, 368a) (emphasis added).
- **"None of the experts presented by defendant were ready to testify** that defendant has undergone anything more than the first embryonic stirrings of moral sensibility." (Appendix, 369a) (emphasis added).

The record in this case shows that the trial court imposed the burden of proof on Mr. Masalmani, both in terms of the manner in which it conducted the hearing and the significant weight it placed, from the outset, in favor of granting the government's motion seeking a LWOP sentence.

This Court should issue an opinion clarifying that when the government seeks to impose a LWOP sentence on a juvenile, the government bears the burden of showing that the

Miller factors support the LWOP sentence it seeks. Doing so is consistent with due process and Michigan's longstanding jurisprudence. Most significantly, allocating the burden to the government in this situation will help ensure that *Miller* hearings in Michigan are fundamentally fair and reach consistent results.

Request for Relief

Defendant-Appellant Ihab Masalmani asks this Honorable Court to reverse the decision below and remand for resentencing pursuant to *Miller v Alabama* and MCL 769.25.

Respectfully submitted,

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