STATE OF MICHIGAN

IN THE

SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
SHAPIRO, P.J., AND MARKEY, METER, BECKERING, STEPHENS, M.J. KELLY, AND RIORDAN, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

KENYA ALI HYATT,

Defendant-Appellee.
/

Supreme Court
No. 153081

Court of Appeals
No. 325741

Circuit Court
No. 13-032654-FC

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# PLAINTIFF-APPELLANT'S REPLY TO DEFENDANT-APPELLEE'S ANSWER TO PLAINTIFF-APPELLANT'S AMENDED APPLICATION FOR LEAVE TO APPEAL

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## ARGUMENT

### I. Introduction: Defendant has failed to address the merits of the People's Amended Application for Leave to Appeal.

The People first note that Defendant has failed to address the arguments that we have put forth in our Amended Application for Leave to Appeal. In our Amended Application, we argue that the four-judge majority of Court of Appeals conflict panel, in *People v Hyatt*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 325741), lv pending, clearly erred in creating and applying a new standard of review, one which fails to afford proper deference to a sentencing judge under MCL 769.25 and MCL 769.25a and that permits the appellate court to substitute its judgment for that of the sentencing judge in such proceedings when a sentence of life without parole ("LWOP") is imposed on a juvenile convicted of first-degree murder. Thus, as Defendant does not provide an argument to the contrary, the People assert we are correct and that the four-judge *Hyatt* majority must be reversed on this matter and Defendant's sentence affirmed.

The undersigned appreciate counsel's argument that the undersigned engaged in "linguistic gymnastics," but the undersigned disagrees. (Def's Answer to the People's Amended Application for Leave to Appeal, at 8.) To be sure, if anyone understands linguistic gymnastics, it is the undersigned, who received his undergraduate degree in linguistics and was a gymnast. The People have appropriately interpreted the four-judge *Hyatt* majority's legal analysis in this case. The "certain fine distinctions" pointed out by the People, which Defendant mentions, (Def's Answer to the People's Amended Application for Leave to Appeal, at 8), are of utmost importance because the four-judge *Hyatt* majority's analysis pertaining to the standard of review is clearly erroneous. The four-judge majority stated, "[A]n appellate court should view [ ] a [life-without-parole] sentence as inherently suspect." *Hyatt*, ___ Mich App at ___; slip op at 26. Yet, the majority then stated, "[W]e do not suggest a presumption against the constitutionality of such

a sentence[.]" *Id.* Well, which is it? Is a life-without-parole "inherently suspect," i.e., is there a presumption against such sentences or not? The People genuinely assert that such sentences are not "inherently suspect" nor is there a presumption against them. A decision to impose a life-without-parole sentence on a juvenile convicted of first-degree murder is appropriately left within the sentencing judge's discretion, not the appellate court's discretion.

The People also recognize that Defendant argues the entire Sixth Amendment analysis is moot because he believes a LWOP as imposed on a juvenile is barred under Michigan's Constitution, Const 1963, art 1, § 16. While Defendant does not expound on his argument in his Answer to the People's Amended Application, we do recognize that he briefs his argument in his own Amended Application for Leave to Appeal. As such, the People do not address Defendant's constitutional argument on this subject within our Reply, but suffice it to say that nothing of significance has changed since this Court last answered this very question just over two years ago in *People v Carp*, 496 Mich 440, 521; 852 NW2d 801 (2014), vacated on other grounds by *Carp v Michigan*, ___ US ___; 136 S Ct 1355; 194 L Ed 2d 339 (2016), and by *Davis v Michigan*, ___ US ___; 136 S Ct 1356; 194 L Ed 2d 339 (2016), holding that Michigan's Constitution does not bar a LWOP sentence imposed on a juvenile under MCL 769.25. As such, Article 1, Section 16 does not bar a LWOP sentence imposed on a juvenile under MCL 769.25.

This now brings us to the merits of Defendant's Answer. Defendant only substantively argues that the *Hyatt* panel erroneously determined that judges, not juries, are permitted to impose a LWOP sentence on a juvenile under MCL 769.25. While this is more appropriately addressed in Defendant's Amended Application, the People provide the following analysis to rebut Defendant's arguments. We assert that the unanimous decision (consisting of parts I, II and

III) of the *Hyatt* court is correct and that Defendant continues to misplace his focus and arguments.

**II. The Sixth Amendment of the U.S. Constitution requires any fact that increases the penalty for a crime beyond the prescribed statutory maximum to be submitted to a jury and proven beyond a reasonable doubt. Neither *Miller v Alabama* nor MCL 769.25 require any factual finding by a jury because the statutorily authorized maximum penalty a court may discretionarily impose at the moment a juvenile-defendant is convicted of first-degree murder is life imprisonment without parole, taking into consideration the particular characteristics associated with the juvenile murderer's youth.**

Defendant poses the general question, "Who determines the sentence in a case involving the potential for imposition of LWOP against a juvenile murderer tried as an adult and convicted of first-degree murder: a judge or a jury?" The seven-member *Hyatt* court unanimously and correctly answered this question, "A judge."[1] *Hyatt*, ___ Mich App at ___; slip op at 21, 29. Defendant argues the *Hyatt* court is wrong and that *Miller v Alabama*'s, 567 US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), Eighth Amendment limits on juvenile sentencing, as codified by MCL 769.25, trigger a Sixth Amendment right to have a jury determine each and every *Miller* factor and ultimately determine whether a juvenile murderer is "irreparably corrupt" before a sentence of LWOP can be imposed. Review of relevant United States Supreme Court precedent correctly led the *Hyatt* court to determine "a judge, not a jury, is to make the determination of whether to impose a life-without-parole sentence or a term-of-years sentence under MCL 769.25." *Hyatt*, ___ Mich App at ___; slip op at 21. Defendant has failed to prove his argument to the contrary, and he will not be able to prove his argument to the contrary.

[1] The three-judge panel in *People v Perkins*, 314 Mich App 140, ___; ___ NW2d ___ (2015) (Docket Nos. 323454, 323876, 325741); slip op at 20–21, and Judge SAWYER, in *People v Skinner*, 312 Mich App, 77–78; 877 NW2d 482 (2015) (SAWYER, J., dissenting), lv pending also correctly came to the conclusion that a judge, not a jury, determines whether a juvenile murderer should receive a sentence of life without parole under MCL 769.25, and that MCL 769.25 is not violative the Sixth Amendment, US Const, Am VI.

Stopping short of completely plagiarizing the *Hyatt* court's opinion, the People will state that we rely on sections I, II, and III of the *Hyatt* opinion in full—whereas we do challenge part IV in our own amended application for leave to appeal. Nevertheless, we provide the following analysis and argument in the interest of completeness and to rebut some of Defendant's erroneous arguments.[2]

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." US Const, Am VI. "This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt." *Hurst v Florida*, 577 US ___, ___; 136 S Ct 616, 621; 193 L Ed 2d 504 (2016). In *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the United States Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added). In *Blakely v Washington*, 542 US 296, 303; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the Court further defined "statutory maximum" as the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Thus, the initial task is to determine the "statutory maximum" under MCL 769.25 for juveniles who are convicted of first-degree murder, i.e., the maximum legislatively authorized sentence that could be imposed without the trial court making any factual findings beyond those reflected in the jury's verdict. To do this, the Court must first analyze the ruling in *Miller*.

[2] Defendant's arguments primarily draw on the two-judge majority's reasoning and holding in *Skinner*, which the *Hyatt* court unanimously rejected. Hence, another reason the People incorporate and rely on parts I, II, and III of the *Hyatt* decision to rebut Defendant's arguments.

The *Miller* Court noted that the Eighth Amendment prohibition "encompasses the foundational principle that the imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." 567 US ___; 132 S Ct at 2466. The *Miller* Court explained, "[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. By making youth and all that accompanies it irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* at ___; 132 S Ct at 2469. As such, while not imposing a categorical bar to LWOP sentences on juvenile murderers convicted of first-degree murder, the Court required "a sentencer have the ability to consider the 'mitigating qualities of youth' before imposing LWOP" and take into account those characteristics, distinguishing "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at ___; 132 S Ct at 2467, 2469.

*Miller* does not address the issue of who should decide whether a juvenile murderer receives a LWOP sentence. The court simply states, "[O]ur individualized sentencing decisions make clear that a *judge or jury* must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at ___; 132 S Ct at 2475 (emphasis added). Defendant reasons that a jury must determine the sentence because MCL 769.25, which specifically incorporates *Miller*, creates a "statutory maximum" sentence of a term-of-years, and an in order to impose a sentence of LWOP "fact-finding" must occur, which thereby increases the "statutory maximum" beyond that legislatively authorized at the time of the jury's verdict. Defendant's argument is misplaced as noted in *Hyatt*.

In response to *Miller*, our Legislature enacted MCL 769.25. For certain, enumerated homicide offenses, the statute allowed the prosecuting attorney to "file a motion under this

section to sentence" a juvenile offender "to imprisonment for life without the possibility of parole[.]" MCL 769.25(2). The statute further states, in pertinent part:

> (6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in *Miller v Alabama*, 5[67] US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.
>
> (7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing. [MCL 769.25(6)–(7).]

Absent a motion by the prosecutor seeking the penalty of life without parole, however, see MCL 769.25(4), or "[i]f the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years[,]" MCL 769.25(9).

Thus, contrary to Defendant's assertion, the term-of-years sentence is not the "statutory maximum" under MCL 769.25. *Hyatt,* ___ Mich App at ___; slip op at 19. MCL 769.25 and *Hyatt* correctly make clear that LWOP is the statutory maximum that a court could impose *at the time* the jury returns a verdict of guilty of first-degree murder, which is solely contingent on the prosecution filing a timely motion seeking such sentence after the jury's verdict, a procedural mechanism, not a factual finding. Defendant's argument conflates the notion of a "statutory maximum" with an entirely different concept—the specification by our Legislature of what facts a sentencing court may consider in exercising its discretion within a statutorily permitted sentencing range.

If a "*Miller* hearing" is conducted, judges in Michigan are then required to specify the aggravating and mitigating circumstances that he or she considered when imposing a sentence, thus exercising their discretion. The trial court's consideration of the *Miller* factors and any other relevant criteria do not, contrary to Defendant's argument, increase the statutory maximum. The maximum statutory penalty for first-degree murder is found in MCL 750.316, "Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, a person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life without eligibility for parole." At the point a juvenile is convicted of first-degree murder, MCL 769.25 then instructs a trial court *how procedurally* to impose the maximum statutory penalty, a sentence of LWOP, on a juvenile convicted of first-degree murder in accordance with *Miller*. Nothing in MCL 769.25 alters the maximum statutory penalty in Michigan for first-degree murder.

The United States Supreme Court foresaw Defendant's arguments when it issued its ruling in *Alleyne v United States*, 570 US ___, ___; 133 S Ct 2151, 2163; 186 L Ed 2d 314 (2013), in which the Court clearly stated, "We have long recognized that broad sentencing discretion, informed by judicial fact-finding, does not violate the Sixth Amendment." See also, *Cunningham v California*, 549 US 270, 294; 127 S Ct 856; 166 L Ed 2d 856 (2007) (noting that "in the wake of *Apprendi* and *Blakely* some states . . . [some] States have chosen to permit judges genuinely 'to exercise broad discretion . . . within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal."); *Apprendi*, 530 US at 481 ("nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute"). MCL 769.25 properly permits a trial judge to impose LWOP on a

juvenile convicted of first-degree murder by exercising its discretion within the statutory range in accordance with the mandates of *Miller*.

Contrary to Defendant's argument, the requirement of MCL 769.25(7), that a judge state the aggravating and mitigating circumstance he or she considered in rendering a sentence on the record, is not the equivalent of a requirement for a judge to make specific factual findings before a juvenile murderer is statutorily eligible for a LWOP sentence. Contemplating Defendant's argument, this Court should naturally question why a *Miller* hearing would even be necessary if the juvenile was not statutorily eligible for LWOP under MCL 769.25. A *Miller* hearing is necessary *when* the court is able to consider LWOP as a potential sentence, not *before* such time. Cf. *Hurst*, ___ US ___; 136 S Ct 616 (death penalty not available at time of conviction but for factual findings submitted to a jury); *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002) (death penalty not available at time of conviction but for factual findings submitted to a jury). As Justice SCALIA explained in *Blakely*, there is an important constitutional difference between factual findings necessary to make a defendant eligible for a specified range of penalty and those that shape a trial judge's discretion within that range:

> [T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial fact-finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. [542 US at 308–09.]

*Miller* does not require a specific factual finding by a jury before imposing a LWOP sentence. "Irreparable corruption" is not a factual finding, but merely a conclusion that encapsulates the absence of youth-based mitigation. This conclusion is further supported by the Supreme Court's decision in *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718, 735; 193 L Ed 2d 599 (2016), in which it noted that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." The *Montgomery* Court explained that it did not require such a finding of fact because in announcing a new substantive rule of constitutional law the Court "is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." Id. The People bring to this Court's attention a recent case, *Houston v Utah*, ___ US ___; 136 S Ct 2005; 195 L Ed 2d 221 (2016), in which one of the issues presented by the defendant in his petition for writ of certiorari was whether *Miller*'s requirement for "sentencers to consider an offender's youth and attendant characteristics before finding a juvenile offender to be 'irreparably corrupt' implicate[s] the Sixth Amendment right to a jury trial and th[e] Court's decision in *Apprendi*?"[3] The Supreme Court denied Defendant's petition, which lends credence to the People's position and the *Hyatt* panel's conclusion that *Miller* does not implicate the fact-finding role of a jury under the Sixth Amendment. Moreover, the Michigan Legislature did not alter *Miller* in this regard. MCL 769.25 does not implicate the constitutional fact-finding process associated with the Sixth Amendment. If Defendant's arguments were to be accepted, nothing would bar the principle of *Apprendi* from extending to not only statutorily prescribed facts, but also to facts with constitutional origins. Such a conclusion would be untenable.

[3] Petitioner-Houston's Petition For Writ Of Certiorari, *Houston v Utah*, may be found at <https://assets.documentcloud.org/documents/2705022/Houston-Cert-Petition-Filed.pdf> (accessed October 13, 2016). The lower court decision from the Utah Supreme Court can be found at, *State v Houston*, 353 P3d 55; 781 Utah Adv Rep 33 (2015).

From the foregoing principles, and from the well-established principle that a judge may not impose punishment that a jury verdict does not allow, Defendant reaches the incorrect conclusion that he is entitled to a jury trial: on the *Miller* factors, the ultimate consideration of whether his crime reflects irreparable corruption, and whether he is deserving of a LWOP sentence. Nothing in MCL 769.25 or *Miller*, or any other authorities Defendant cites, supports his conclusion.

## RELIEF

WHEREFORE, David S. Leyton, Prosecuting Attorney in and for the County of Genesee, by Joseph F. Sawka, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court grant the People's Amended Application for Leave to Appeal and, in addition, adopt parts I, II, and III of the *Hyatt* opinion in a peremptory order under MCR 7.305(H)(1), and affirm Defendant's convictions and sentences.

Respectfully Submitted,

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