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

DAVID S. LEYTON (P35086)
Prosecuting Attorney for Genesee County
JOSEPH F. SAWKA (P74197)
Assistant Prosecuting Attorney
Attorneys for Plaintiff-Appellant
900 S. Saginaw Street
Courthouse Room 100
Flint, Michigan 48502
(810) 257-3210

RONALD D. AMBROSE (P45504)
Attorney for Defendant-Appellee
16818 Farmington Road
Livonia, Michigan 48154-2974
(248) 890-1361

PLAINTIFF-APPELLANT'S AMENDED APPLICATION FOR LEAVE TO APPEAL

DAVID S. LETYON
PROSECUTING ATTORNEY
GENESEE COUNTY

BY: JOSEPH F. SAWKA (P74197)
Assistant Prosecuting Attorney

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

UNITED STATES SUPREME COURT

MICHIGAN SUPREME COURT

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

On January 19, 2016, in consolidated cases with his co-defendants, the Court of Appeals affirmed Defendant-Appellee, Kenya Hyatt's, convictions for Count 1: First-Degree Felony Murder, MCL 750.316; Count 2: Conspiracy to Commit Armed Robbery, MCL 750.529[C], MCL 750.157a; Count 3: Armed Robbery, MCL 750.529; and Count 4: Felony-Firearm, MCL 750.227b. *People v Perkins*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket Nos. 323454; 323876; 325741), lv pending. Due to a preceding published opinion, *People v Skinner*, 312 Mich App 15; 877 NW2d 482 (2015), lv pending, holding, under MCL 769.25, juries, not judges, were to determine the sentence of a juvenile convicted of first-degree murder committed at the time the juvenile was less than 18 years of age, the Court of Appeals was bound to vacate Defendant's life-imprisonment-without-parole sentence as the sentence was judge-determined. Nevertheless, the Court of Appeals in *Perkins* declared a conflict with *Skinner* because the *Perkins* court believed judges, not juries, should determine sentences under MCL 769.25. "[W]ere it not for *Skinner*," the three judges of the *Perkins* Court would have affirmed Defendant's sentence of life imprisonment without parole. *Perkins*, ___ Mich App at ___; slip op at 2.

The Court of Appeals convened a rare conflict panel, disconsolidated Defendant's case from his co-defendants, and unanimously held MCL 769.25 requires judges, not juries, to determine the sentence of a juvenile convicted of first-degree murder committed at the time the juvenile was less than 18 years of age. *People v Hyatt*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 325741) (Appendix 1). Yet, four judges of the Court of Appeals conflict panel reversed the trial court's life-imprisonment-without-parole sentence and remanded the case to the trial court for reevaluation of whether "this" juvenile murder "is the truly rare juvenile mentioned in *Miller* [*v Alabama* 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012)] who is

incorrigible and incapable of reform." *Hyatt*, ___ Mich App at ___; slip op at 28. In doing so, the majority created and applied an erroneous rule of law and an erroneous "heightened" abuse-of-discretion standard of review. The remaining three judges of the conflict panel dissented from the majority and would not have reversed Defendant's sentence nor remanded for resentencing because "the sentencing court explicitly mentioned and adhered to the principle of proportionality[]" and in doing so "explicitly took the *Miller* factors into consideration." *Id.* at ___; slip op at 1 (METER, J., concurring in part and dissenting in part). The dissenting judges also noted that that three-judge panel in the original appeal, *Perkins*, ___ Mich App at ___; slip op at 22, would have affirmed Defendant's sentence for the same reasons. *Hyatt*, ___ Mich App at ___; slip op at 1 (METER, J., concurring in part and dissenting in part).

The People of the State of Michigan through their attorney, David S. Leyton, Prosecuting Attorney for the County of Genesee, now seek leave to appeal the Court of Appeals conflict panel's decision, limited to Section IV of the conflict panel's decision, reversing the trial court's sentence of life imprisonment without parole and remanding the case to the trial court for redetermination of Defendant's sentence. The People assert the four-judge majority clearly erred as a matter of law in creating a new rule of law founded on obiter dicta in *Miller* and *Montgomery*, requiring a sentencing court to "find" the juvenile murderer to be "truly rare" before imposing a life-imprisonment-without-parole sentence, and in creating a new standard of review, which discounts the normative discretion afforded to the sentencing judge who is *substantially* better-positioned, particularly in these cases, to evaluate the relative weight of evidence, credibility of witnesses, including the defendant, the societal ramifications resulting from the imposition of the particular sentence, and the impact on the defendant. The three-judge dissent from the conflict panel and the three judges in Defendant's initial case properly evaluated

the record and properly gave deference to the trial court when each respective panel stated that it would affirm the imposed sentence.

Without a doubt, this case involves a substantial question of first impression regarding the appropriate standard of review in both sentencing courts and appellate courts for sentences under MCL 769.25. MCR 7.305(B)(3). The effect of the *Hyatt* majority's clearly erroneous decisions will have an immense impact on the current proceedings involving the hundreds of murderers who are entitled to a redetermination of their sentences under *Miller* and *Montgomery* and on all such future proceedings. Sentencing courts must not be instructed to employ a false standard of law based on non-binding obiter dicta when sentencing juvenile murderers, and such sentences must not be reviewed on appeal without affording proper deference to the sentencing judges' determinations. The *Hyatt* majority's newly created rule of law and heightened standard of review are clearly erroneous. Particularly, the erroneous standard of review permits an appellate court to substitute its judgment for that of the sentencing court, and it must not be allowed to stand as it will cause material injustice. MCR 7.305(B)(5)(a).

For the foregoing reasons and the reasons fully discussed *infra*, the People of the State of Michigan, Plaintiff-Appellant, requests this Honorable Court grant its Amended Application for Leave to Appeal, reverse the decision of the *Hyatt* majority, which erroneously created a new rule of law and standard of review, and affirm Defendant's sentence as the sentencing judge did not abuse her discretion, nor did the appellate court find an abuse of discretion.

STATEMENT OF QUESTIONS PRESENTED

I. Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication. The respective majorities' "beliefs" in *Miller v Alabama* and *Montgomery v Louisiana,* that life-imprisonment-without-parole sentences for juvenile murderers would be "rare," are neither part of nor essential to their respective holdings, and thus they lack the force of binding precedent. Whether the *Hyatt* majority clearly erred as a matter of law when they misconstrued these "gratuitous predictions" and formulated them into a rule of law, which is consequently lacking in foundation, definition, and practicality?

The Court of Appeals:	answered this question, "No."
The Sentencing Court:	was not asked to answer this question.
Plaintiff-Appellant:	answers this question, "Yes."
Defendant-Appellee:	will likely answer this question, "No."

II. Sentencing rests exclusively within the bailiwick of the sentencing court. Michigan appellate courts review sentences for an abuse of discretion, paying deference to a sentencing court's unique position to hear the evidence, evaluate the credibility of witnesses, and to its ultimate decision. Whether the *Hyatt* majority's "heightened" abuse-of-discretion standard of review is clearly erroneous because it is not properly founded in the law, fails to afford proper deference to the sentencing court, and is merely a gambit to substitute the judgment of an appellate court for that of the better-situated sentencing judge?

The Court of Appeals:	answered this question, "No."
The Sentencing Court:	was not asked to answer this question.
Plaintiff-Appellant:	answers this question, "Yes."
Defendant-Appellee:	will likely answer this question, "No."

III. Whether this Court must reverse the *Hyatt* majority's decision to remand for resentencing because the majority completely ignored the applicable abuse-of-discretion standard of review and the requisite deference to be afforded to the sentencing judge when the majority employed its newly created "heightened" abuse-of-discretion standard of review, essentially conducting a *de novo* review of the facts and sentence, and where the sentence imposed was proportionate and within the range authorized by the Legislature?

The Court of Appeals:	answered this question, "No."
The Sentencing Court:	was not asked to answer this question.
Plaintiff-Appellant:	answers this question, "Yes."
Defendant-Appellee:	will likely answer this question, "No."

STATEMENT OF MATERIAL FACTS

I. Introduction[1]

In this Amended Application, the People of the State of Michigan challenge the Court Appeals conflict panel's four-judge majority decision reversing the sentencing court's imposition of life imprisonment without parole as to Defendant's first-degree felony murder conviction. We assert the decisions to affirm Defendant's sentence of life imprisonment without parole by the three dissenting judges from the conflict panel and the three judges from Defendant's initial appeal are the correct rulings as they properly apply the applicable law and recognize the unique position and discretion afforded of the sentencing court in this case. The substantially important issues presented before this Court focus on the life-imprisonment-without-parole sentence originally imposed by the sentencing court under MCL 769.25, the sentencing court's authority and discretion to impose the sentence, and the standard of review on appeal for such sentences.

---

[1] The transcripts in this case will be referred to in the following manner in this Brief:

Proceeding/Date:	**Cited as:**
Trial Volume I, June 17, 2014	"Tr I"
Trial Volume II, June 18, 2014	"Tr II"
Trial Volume III, June 19, 2014	"Tr IIIa"
Trial Volume III, June 20, 2014 (corrected transcript)	"Tr IIIb"
Jury Trial (no transcript volume label), June 24, 2014	"Tr IV"
Trial Volume V, June 25, 2014	"Tr V"
Jury Trial (no transcript volume label), June 26, 2014	"Tr VI"
Trial Volume VIII, June 27, 2014	"Tr VIII"
Trial Volume IX, June 30, 2014	"Tr IX"
Miller Hearing Transcript, November 21, 2014	"MH"
Sentencing Transcript, December 29, 2014	"S"

All other transcripts in this case will be referred to by their respective dates.

The trial transcripts dated June 19, 2014 and June 20, 2014, are both labeled "Trial Volume III." The People have referred to them within this Brief as "Tr IIIa" and "Tr IIIb," respectively. In addition, there does not appear to be a "Trial Volume VII" in this defendant's case. It is likely that because this was a triple co-defendant homicide the transcripts were inadvertently mislabeled.

Accordingly, a full recitation of the evidence and proceedings at trial is not necessary at this point. Rather, the People provide this Court with the necessary evidence introduced at the trial and sentencing stages in order to understand the charges, convictions, the trial court's sentencing decision, and the appellate decisions in this case.

II. Trial Court Proceedings

Defendant, Kenya Ali Hyatt, was charged and tried jointly with his two co-defendants, Floyd Perkins and Aaron Williams, with separate juries for each defendant. The People charged Defendant with: Count 1: First-Degree Felony Murder, MCL 750.316; Count 2: Conspiracy to Commit Armed Robbery, MCL 750.529[C], MCL 750.157a; Count 3: Armed Robbery, MCL 750.529; and Count 4: Felony-Firearm, MCL 750.227b. (Tr I, 4–5; Tr IX, 5–6.) At the time he committed these offenses, Defendant was 17 years, 2 months, and 19 days old.

John Andrew Mick was retired from General Motors, but he chose to work for Legarda Security after his retirement. (Tr IIIa, 15–16.) He worked as a security guard and usually carried a pistol as a sidearm and a revolver in his pocket. (Tr IIIa, 17–18.) On August 14, 2010, he was working at the River Village Apartment complex in Flint, Michigan, around 3:00 a.m., when he was shot multiple times. (Tr IIIa, 16, 49, 186.) Residents of the apartment complex heard the gunshots, looked out their windows, and observed Mr. Mick lying on the ground while two men in black shirts ran through the parking lot. (Tr IV, 6–27.) Police found three shell casings around Mr. Mick's body, which were later determined to be .22 caliber casings. (Tr IIIa, 64; Tr IIIb, 18–23.)

Alecia Wilson was qualified as an expert in forensic pathology, (Tr IV, 135), and performed the autopsy of Mr. Mick's body on August 16, 2010 (Tr IV, 133–35). Dr. Wilson was able to identify "multiple gunshot wounds on the body that eventually corresponded to four

gunshot wound paths." (Tr IV, 135.) One bullet entered the back left side of the victim's scalp, exiting near the forehead, grazing the left cheek. (Tr IV, 136.) This same bullet then entered the top of the left shoulder, with the bullet ending up deep in the muscle on the left side of the back thorax area. (Tr IV, 136, 140, 145.) Another bullet entered behind the left ear and exited the right cheek. (Tr IV, 138–41.) This bullet went through the spine, severing the spinal cord. (Tr IV, 140–41.) A third bullet, and fourth path, entered the left chest region and was recovered from the lower back. (Tr IV, 138–40.) This bullet went through the lung, causing significant injury to the lung and bleeding inside the left chest area. (Tr IV, 151–52.) While all gunshot wounds had the potential to be fatal, Dr. Wilson testified that two were immediately incapacitating—the one that entered behind the left ear and severed the spine and the one on the left side of the chest that caused significant internal bleeding. (Tr IV, 151–52.) She could not tell which bullet came first. (Tr IV, 175.)

Police retrieved surveillance video from the apartment complex, which showed all three defendants entering and exiting the apartment complex around the time Mr. Mick was killed. (Tr IV, 180–85; Tr V, 14–79; Tr VI, 19–22.) On February 20, 2013, Sergeant Green interviewed Defendant, Kenya Hyatt, at the Genesee County Sheriff's Detective Bureau. (Tr IIIb, 203.) Defendant was read his *Miranda* rights, which he voluntarily waived. (Tr IIIb, 203–04.) Sergeant Green learned that Williams and Hyatt were Perkins's cousins, but Williams and Hyatt were not related. (Tr IIIb, 208–09.) During the interview, (People's Exhibit 190, admitted at Tr IIIb, 212), Defendant Hyatt stated that he was "young and on drugs," high on "crack", and he could not "really remember" what occurred during the robbery and murder. Yet, Defendant stated he did not mean for Mr. Mick to get hurt intentionally. He stated his intention was "[j]ust to take the gun." He stated that it was Floyd Perkins's idea to rob Mr. Mick. According to Defendant Hyatt,

as they attempted to rob Mr. Mick, Mr. Mick grabbed the gun from Defendant Hyatt with both of his hands, and the gun "went off." However, Defendant Hyatt was not sure how many times the gun fired. He also stated he did not know a bullet was in the chamber. After the murder, co-defendant Perkins disposed of the gun according to Defendant Hyatt. Yet, after the shooting, Defendant Hyatt claimed he "blanked out."[2] (People's Exhibit 190, admitted at Tr IIIb, 212.)

Defendant Hyatt's jury convicted him as-charged of all counts: first-degree felony murder, conspiracy to commit armed robbery, armed robbery, and felony-firearm. (Tr IX, 5–6.) Because Defendant was 17 years, 2 months, and 19 days old when he murdered Mr. Mick, mandatory life imprisonment was no longer a constitutional punishment after the United States Supreme Court's decision in *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012). As such, on July 15, 2014, the People filed a timely motion within 21 days of Defendant's conviction seeking a sentence of life imprisonment without the possibility of parole for Defendant's first-degree felony murder conviction pursuant to MCL 769.25(3), which our Legislature enacted, codifying the principles of *Miller*, 567 US ___; 132 S Ct 2455. Due to the motion, the sentencing court was required to conduct a hearing in compliance with MCL 769.25(6)–(7), hereinafter referred to as a "*Miller* hearing."

[2] Although not part of Defendant Hyatt's record, the trial court was able to hear all versions of what occurred from each co-defendant during their respective interviews that were played to their respective juries. Defendant Perkins admitted to conspiring with Hyatt and Williams to steal Mr. Mick's gun. He knew Hyatt had a gun and planned to use it during the robbery, and he told the shooter to pull the gun out and then he grabbed Mr. Mick. When Hyatt shot Mr. Mick, Perkins stole Mr. Mick's gun and fled from the scene, but turned around and heard three more gunshots. Defendant Williams stated he conspired with Perkins and Hyatt. Perkins was the first person to discuss the plan, saying they needed a gun for his family's protection, and Williams told them where they could get a .22 caliber sawed off rifle. Williams admitted to procuring the gun from a friend, "Chief," for them to use. Williams said the plan was for him to lure Mr. Mick over to the parking lot by yelling and screaming. While that occurred, Hyatt and Perkins were waiting across the parking lot. Mr. Mick arrived, told Williams to go home, and as Williams left the scene he heard the gunshots. See *Perkins*, ___ Mich App at ___; slip op at 3.

III. Sentencing Court Proceedings

On November 21, 2014, the trial court conducted an evidentiary hearing pursuant to MCL 769.25(6) and in accordance with *Miller*, 567 US ___; 132 S Ct 2455. At the *Miller* hearing, the People called Mt. Morris Township Police Department Chief of Police, Terrance Green, who was the officer in charge of the murder investigation of John Andrew Mick on August 14, 2010. (MH.) Defense counsel called Dr. Karen Noelle Clark, a behavioral psychologist, Kenya A. Hyatt, Sr., Defendant's father, and Kenya A. Hyatt, Jr., Defendant. (MH.)

Sergeant Green testified that during his initial interview with Hyatt's co-defendants, Aaron Williams and Floyd Perkins, each of them indicated that the plan was only to take Mr. Mick's firearm and that no one was supposed to be injured. (MH, 10.) When Sergeant Green interviewed Defendant Hyatt, he stated that the initial gunshot that hit Mr. Mick was accidental and when asked about the additional shots, Defendant "claimed that he couldn't remember, . . . he blacked out or was high, somethin' of that nature." (MH, 11.) Sergeant Green reviewed the entire case, and in his opinion, the murder of Mr. Mick was not an accident. (MH, 11.)

Sergeant Green then testified about Defendant's prior criminal act of home invasion that occurred in February of 2013, which was dismissed due to the outcome of the present case. (MH, 12.) Sergeant Green testified about his prior contact with teenagers in the criminal justice system. (MH, 12.) He testified that during his interview with Defendant, Defendant showed no remorse for the murder, which was in contrast to co-defendant Williams and co-defendant Perkins who immediately showed remorse for the crime. (MH, 12–13.) In Sergeant Green's opinion, it appeared as though Defendant Hyatt was only concerned with getting away with the crimes and

not being charged. (MH, 12–13.) Based on his experience and knowledge of the case, he concluded and opined that Defendant Hyatt could not be rehabilitated. (MH, 12.)

The People also admitted Defendant's school records, which were given to the People by defense counsel, from eighth grade (2007-2008) and ninth grade (2008-2009), which indicated a number of behavioral reports and suspensions and showed Hyatt withdrew from school in February 2009 and moved to Arkansas for the 2010-2011 school year after the murder. (MH, 5.) According to the admitted records, Defendant attended Forest High School in Arkansas and in February 2011 he withdrew from that school. (MH, 5) The People also admitted Defendant's Genesee County Youth Corporation Counseling records. (MH, 5.) Those records noted that Defendant was suspended from school for threatening to "put a cap in the teacher." (MH, 5.) A note dated December 5, 2008, stated that the counselor warned Hyatt if his behavior did not change, then court would be the next step. (MH, 5.) Defendant was also kicked out of school for having salt crystals in baggies, so they looked like crack-cocaine, and intended to pass them off as crack. (MH, 5–6.) In a progress report dated January 23, 2009, a counselor asked Hyatt if he would feel nervous, "like shake, heart pounding, etcetera if he were to rob a bank," and "he said 'no' he would be calm." (MH, 6.) When the counselor asked what he felt when he got caught with the baggies of crystals, Defendant Hyatt said "he was angry but again, no physical signs." (MH, 6.) The counselor was concerned with this and, among other things, said that the Defendant "just may not have any remorse or conscience." (MH, 6.)

Dr. Karen Clark was qualified as an expert in psychology. (MH, 27.) She testified that she performed a psychological evaluation on Defendant that lasted for approximately three hours. (MH, 28.) Prior to the evaluation, she reviewed various medical records, police reports, and related documents relating to Defendant. (MH, 28–29.) She concluded Defendant had a

below average IQ. (MH, 32–33.) She testified that he came from a dysfunctional family, was left to his own devices, which resulted in negative influences in his life, and that most of his life was controlled by drugs. (MH, 29–47, 56.) Defendant's score on the "Behavior Assessment System for Children" indicated that "there was serious maladjustment." (MH, 34.) This is "clinically significant in the areas internalizing problems, social stress and depression." (MH, 34.) "[H]is responses indicated that he was at risk, identified as significant problems that may be precursors to more serious problems if not addressed." (MH, 35.) "He may experience periods of marked emotional, cognitive or behavioral dysfunction." (MH, 36.) Dr. Clark identified Defendant Hyatt's father as his positive male role model in his life. (MH, 38–39.)

When asked to discuss the murder of Mr. Mick, Defendant Hyatt responded that "he was high on drugs, mostly crack-cocaine, and that, that he really didn't remember what happened." (MH, 42.) Yet, Defendant believed "that based on [his] own values that he was sure that he didn't shoot an innocent man because he wasn't, because [he] wasn't raised like that." (MH, 42.) When specifically asked whether she believed Defendant Hyatt was capable of remorse, she said, "Um I, I think that he, I am not sure. I think that he is capable of remorse. I am not sure if he is capable of remorse prior to an incident and able to direct his behavior in such a way as to avoid such an unfortunate incident." (MH, 44–45.) She further testified, "[H]e would have to work extremely hard to reconcile the circumstances of his life and to commit himself to doing the things that are necessary to be an upstanding, um productive, uh independent adult." (MH, 47.)

On cross-examination, Dr. Clark testified that she did "feel that [Defendant] is not a sensitive, compassionate young man." (MH, 51.) She testified that Defendant is "pretty disconnected [ ] from societal morals and mores," which was concerning to her. (MH, 51.) She further testified that *if* Defendant is able to change that "it's going to require extreme effort and

dedication on his part." (MH, 53–54.) Dr. Clark readily admitted, "I have no way of predicting whether he is going to be able to change his course," but she could not say he was "irredeemable." (MH, 53–54.)

Kenya Hyatt, Sr., Defendant's father, testified about the family dysfunction around which Defendant was raised. (MH, 60–65.) He testified about the problems that Defendant had in school, primarily about how he had to repeat grade levels. (MH, 65–70.) During cross-examination, the prosecutor asked Mr. Hyatt, Sr. where his son was living during 2010, to which Mr. Hyatt Sr. replied, "I do take a lot of pain pills, uh so tryin' to recollate and put all these dates together can be a little confusing." (MH, 91–92.) Yet, he never thought to mention this on direct examination when he was able to discuss Defendant's birth, middle school activities, and high school activities year by year. (MH, 70–85.)

Defendant chose to testify on his own behalf. He testified that he was with his co-defendants on August 14, 2010, and that he was in possession of a gun, but he did not recall how he obtained the gun. (MH, 102.) He testified that he could not recall anything that happened the night of the murder due to his use of cocaine. (MH, 102–04; 115–16.) On cross-examination, the prosecutor pointed out to Defendant that he told Sergeant Green what he did was an "accident," to which Defendant responded, he did not recall what he said.[3] (MH, 116–17.)

On December 29, 2014, the sentencing court specified its findings on the record pertaining to the aggravating and mitigating circumstances relating to Defendant's sentence. The trial court summarized the *Miller* factors and first considered that Defendant was seventeen years old, almost eighteen years old, at the time of the offense. (S, 4–7.) Yet, the court ultimately

[3] Yet, at sentencing, during his allocution, Defendant stated: "I did not set out that night to harm anyone. My--my--my judgment was clouded that night. You're right, I did give him the gun. My intention[s] were not to have killed and taken Andy from you or anyone in your--your family." (S, 17.)

determined Defendant's age was not a significant mitigating factor due to the premeditated heinous nature of the crime. (S, 9.) Second, the court considered his unstable family background. (S, 7.) Third, "his school records[,] the Court was unhappy to see that there was a pattern of disrespectful and disorderly behavior that led to numerous suspensions and even threats to teachers." (S, 8.) "[T]here were counseling records that [his] mother . . . brought the defendant to counseling because the problems with stealing and lying, smoking of weed and cigarettes, and he was perceived to be a youth out of control who did just what he pleased. There was even a reference to a gun problem two years before the homicide of Mr. Mick." (S, 8.) Fourth, the court considered the circumstances surrounding the homicide. The court focused on "Mr. Hyatt's participation[,] this was a very well planned out incident. This did not just happen on the spur of the moment." (S, 8.) The sentencing court summarized the facts of the case:

> The three young men, two of them were cousins of Mr. Perkins including Mr. Hyatt and Mr. Aaron Williams planned this out. They wanted to steal the gun that belonged to the security guard, Mr. Mick. In order to do that, they had to have another gun for reasons I'm not too clear on but they did decide to get another gun and certainly they planned out how to get the other gun to help them get Mr. Mick's gun. And they even caug--concocted a loose [sic] to get the security guard out of his car so that he would be an easier target, an easier victim from whom to steal the gun. As I said this other gun was procured with help from Mr. Aaron Williams. And what is most disturbing of all of course is that Mr. Mick was shot not once but four times. This defendant was the person who shot that gun. It certainly was not an accident in my opinion. But a well-planned event both before leading up to the incident to get the gun also to get Mr. Mick out of his car and then the execution in the wee hours of the morning in the parking lot where Mr. Mick was serving as a security guard. [S, 8–9.]

Next, the court rejected Defendant's statement that he was "high on drugs" because "certainly that [did] not come across in any of [ ] the videos or any of the interviews that were conducted with him." (S, 10.)

Finally, as to the "potential for rehabilitation," the sentencing court did believe that Defendant "is capable of learning and did actually accomplish something while he's been incarcerated," speaking about his obtainment of his G.E.D. (S, 11.) The court further considered that Dr. Clark found Defendant "to be a seriously disturbed young man," who "keeps his problems inside not expressing them or dealing with them effectively." (S, 10.) That he may experience periods of marked emotional cognitive or behavioral dysfunction. (S, 10.) "She did not see him as a leader." (S, 10.) His adolescence is marred by extreme turmoil. (S, 10–11.) "Dr. Clark found the defendant to be very defiant and easily led. At page forty-eight of the testimony she said he was incapable of resisting negative influences." (S, 11.) The court took seriously Dr. Clark's testimony:

> Doctor Clark thought within five years he would not be able to be reformed. She was very concerned looking out decades perhaps as many as forty years. She could not say that he would be reformed or have a potential for rehabilitation. She said he is not a sensitive compassionate young man. And really no way of predicting whether he is going to be able to change his course. She said that to change would require quote in quote extreme effort and dedication on his part, end quote. Quote, it depends on him, end quote. As I've said five years out, prognosis in her view is very, very bleak, end quote. She cannot say where looking out as far as forty years but would require extreme effort on his part. She did feel that much of his behavior was given by drugs. And noted, of course, that we don't think he'll be likely to be able to receive drugs and have them on a regular basis in the prison setting, at least we hope not. [S, 11–12.]

Considering Defendant Hyatt's background as presented through the testimony and records, considering the factors set forth in *Miller*, the nature of the crime itself and the Defendant's level of participation as the actual shooter in this case, the court reasoned that "the principle of proportionality requires this Court to sentence him to life in the State prison without parole." (S, 12.)

IV. Direct Appeal to the Court of Appeals

On direct appeal, in a unanimous opinion, the Court of Appeals affirmed all of Defendant Hyatt's convictions, but was compelled to remand the case back to the trial court based on a two-judge majority opinion in *People v Skinner*, 312 Mich App 15; 877 NW2d 482 (2015), lv pending, which held juries, not judges, were to determine the sentence of a juvenile murder under MCL 769.25. The *Perkins* Court, however, explicitly disagreed with the two-judge majority opinion in *Skinner*, declaring a conflict under MCR 7.215(J)(2) and stating, "we believe *Skinner* was wrongly decided," and "[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." *Perkins*, ___ Mich App at ___; slip op at 14, 22–23. The Court of Appeals, instead, adopted Judge SAWYER's well-reasoned dissent in *Skinner*, which stated judges, not juries, were to determine such sentences. *Id.* at ___; slip op at 17.

V. Application for Leave to Appeal to the Michigan Supreme Court

On January 27, 2016, during the interim of convening the conflict panel, the People filed an Application for Leave to Appeal the Court of Appeals' decision in Defendant Hyatt's case to this Honorbale Court, arguing (1) that MCL 769.25 is constitutional as it is consistent with the Sixth Amendment and *Miller*, 567 US ___; 132 S Ct 2455, and (2) that *Skinner* was incorrectly decided, should be overruled, the rational in *Perkins* should be adopted, and that this Honorable Court should affirm Defendant Hyatt's sentence.[4] On February 8, 2016, Defendant filed his

[4] Due to MCR 7.215(J)'s timing mechanism, the People filed their application before the Court of Appeals' poll occurred, not knowing whether the Michigan Supreme Court would grant leave to appeal on *Skinner* during the interim. See also IOP 7.215(J) ("Thus, the parties in the second appeal are responsible for monitoring the Supreme Court's orders granting leave to appeal and for understanding the impact of such an order on their time for reconsideration or application for leave in the second case.")

Answer to the People's Application for Leave to Appeal, and the People filed a reply to Defendant's Answer.

VI. Court of Appeals Convenes a Conflict Panel

Subsequent to the filings in the Michigan Supreme Court, on February 12, 2016, the Court of Appeals ordered a special panel to be "convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *People v Skinner*, [312 Mich App 15; 877 NW2d 482 (2015), lv pending]." *People v Perkins*, unpublished order of the Court of Appeals, issued February 12, 2016 (Docket Nos. 323454, 323876, 325741) (Appendix 2). Furthermore, it ordered that part IV, section C, of the original *Perkins* opinion be vacated in its entirety pursuant to MCR 7.215(J)(5), and it permitted the parties to file supplemental briefs. *Id.* The Court, on its own initiative, then invited the Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan to file amicus curiae briefs. *People v Hyatt*, unpublished order of the Court of Appeals, issued February 19, 2016 (Docket No. 325741) (Appendix 3).

VII. Court of Appeals Conflict Panel's Decisions

The Court of Appeals convened a conflict panel to resolve the disparity between *Perkins* and *Skinner*. On July 21, 2016, after briefing and arguments, the conflict panel unanimously held judges, not juries, are to determine the sentence of a juvenile murder under MCL 769.25, and such a holding is consistent with the Sixth and Eighth Amendments of the U.S. Constitution. *People v Hyatt*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 325741). Four judges of the conflict panel, however, chose to reverse the trial court's imposed sentence because they felt that the trial court judge did not "decide whether [Defendant] is the truly rare juvenile mentioned in Miller who is incorrigible and incapable for reform." *Id.* at ___; slip op at 27–29. The remaining three judges, on the other hand, disagreed with the majority and did not find a legal

basis to reverse Defendant's sentence because "[t]he sentencing court explicitly mentioned and adhered to the principle of proportionality. In addition, the sentencing court, as noted by the panel in [*Perkins*, ___ Mich App at ___; slip op at 22], explicitly took the *Miller* factors into consideration." *Hyatt*, ___ Mich App at ___; slip op at 1 (METER, J., concurring in part and dissenting in part).

VIII. People's Motion to Amend Application for Leave to Appeal

On July 29, 2016, the People filed a Motion with this Court requesting permission to amend our initial Application for Leave to Appeal. In our Motion, we asked this Court to allow us to withdraw from this Court's consideration the question about whether a judge or a jury is authorized to decide a juvenile murder's sentence pursuant to MCL 769.25 because we were the prevailing party on this issue from the Court of Appeals conflict panel, which unanimously held judges, not juries, were to determine the sentence. Second, we asked this Court to allow us to add issues pertaining to the conflict panel's decision to reverse the trial court's sentence and remand for resentencing based on the majority's newly created rule of law and heightened standard of review.

The People now file our Amended Application for Leave to Appeal. Additional pertinent facts and procedural history will be discussed in the body of this Brief, *infra*, to the extent necessary to fully advise this Court as to the arguments raised.

ARGUMENTS

I. Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication. The respective majorities' "beliefs" in *Miller v Alabama* and *Montgomery v Louisiana*, that life-imprisonment-without-parole sentences for juvenile murderers would be "rare," are neither part of nor essential to their respective holdings, and thus they lack the force of binding precedent. The *Hyatt* majority clearly erred as a matter of law when they misconstrued these "gratuitous predictions" and formulated them into a rule of law, which is consequently lacking in foundation, definition, and practicality.

a. Issue Preservation

The People assert the *Hyatt* majority's ruling, that a sentencing court must find the juvenile murderer to be "a truly *rare* juvenile" before imposing life imprisonment without parole, is a clearly erroneous interpretation and application of *Miller*'s holding. This issue was not explicitly addressed by the parties in the direct appeal nor in the conflict panel. Rather, it was addressed as part of the general discussion pertaining to the standard of review. Nonetheless, as the *Hyatt*'s majority's new rule of law is essential to its holding, this issue is properly preserved for appeal before this Court. MCR 7.303(B)(1); MCR 7.305(B)(3); MCR 7.305(B)(5)(a).

b. Standard of Review

This Court reviews a lower court's ruling, to the extent it is based on questions of law, *de novo*. *People v Hall*, ___ Mich ___; ___ NW2d ___ (2016) (Docket No. 150677); slip op at 4–5. Questions of constitutional and statutory interpretation present questions of law that are also reviewed by this Court *de novo*. *Id.* at ___; slip op at 5.

c. Argument

i. Introduction

The United States Supreme Court's holding in *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012) is a direct one. In her majority opinion, Justice KAGAN wrote,

"We therefore hold that the Eight Amendment forbids a sentencing scheme that mandates life imprisonment without possibility of parole for juvenile offenders." *Id.* at ___; 132 S Ct at 2469. The holding is nothing more and nothing less. Yet, the Michigan Court of Appeals majority erroneously chose to expand the holding in *Miller* by relying on obiter dicta within the *Miller* opinion, holding that trial courts must find the juvenile murderer to be "the truly rare individual mentioned in *Miller*" before imposing a life-imprisonment-without-parole sentence. *People v Hyatt*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 325741); slip op at 28. The Court of Appeals supported its holding by utilizing further obiter dicta from the majority's holding in *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 LE d 2d 599 (2016). In doing so, the Court of Appeals created a non-existent rule of law from *Miller* and erroneously imposed their newly created rule of law in this case, which must be reversed by this Court.

ii. The majority opinion in *Miller v Alabama* expressed a hypothetical "belief" in obiter dicta that life-imprisonment-without-parole sentences would be "uncommon" or "rare" for juvenile murderers, and the majority opinion in *Montgomery v Louisiana* expressed a similar "belief" in obiter dicta; however, neither "belief" constitutes a binding rule of law as neither was essential to their respective case holdings.

Generally speaking, case holdings are binding upon courts in future cases under the doctrine of *stare decisis*, whereas dicta are not. See *Kokkonen v Guardian Life Ins Co*, 511 US 375, 379; 114 S Ct 1673; 128 L Ed 2d 391 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend[.]"). Given this distinction, isolating a case holding from its dicta is critical. "Dictum" is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication." Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi-Kent L Rev 655, 710 (1999); see also *Wold Architects and Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006) (citations omitted) (defining "dicta"). Michigan law rightly distinguishes

between obiter dicta and judicial dicta. The former is a statement in a judicial opinion which is not essential to a determination of the case then before the court and consequently lacks the force of a binding adjudication. *Roberts v Auto-Owners Ins Company CEO*, 422 Mich 594, 587–98; 374 NW2d 904 (1985); see also *McNally v Wayne Co Canvassers*, 360 Mich 551, 558; 225 NW2d 613 (1947). In contrast, judicial dicta is a statement by the court which, although not technically part of the court's holding in the case, is integral to the court's reasoning and may be as binding as the precise holding of the case. *Johnson v White*, 430 Mich 47, 55 n 2; 420 NW2d 87 (1988); see also Scofield, *The Distinction Between Judicial Dicta and Obiter Dicta*, 25 L A Law 17 (2002), <https://www.lacba.org/docs/default-source/lal-back-issues/2002-issues/october-2002.pdf > (accessed August 29, 2016) (citing cases to illustrate that the failure of some courts to understand the distinction between judicial dicta and obiter dicta has led to confusion in case law).

The constitutional question posed in *Miller* was a narrow one, whether mandatory life without parole for those under the age of 18 at the time of their crimes violated the Eighth Amendment's, US Const, Am VIII, prohibition on "cruel and unusual punishments?" 567 US at ___; 132 S Ct at 2460. The *Miller* Court unequivocally stated:

> We therefore *hold* that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. . . . *Because that holding is sufficient to decide these cases*, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said . . . *we think* appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. . . . *Although we do not foreclose* a sentencer's ability to make that judgment in homicide cases, *we require* it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. [*Miller*, 567 US at ___; 132 S Ct at 2469 (emphasis added; footnote and internal citations omitted).]

Miller's holding was premised on the prior rulings of *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (imposing a categorical ban on capital punishment for all juvenile offenders) and *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (banning life-without-parole sentences for juveniles in non-homicide cases). Nowhere within the holdings of *Miller*, *Roper*, or *Graham* did the United States Supreme Court *require* sentencers *to determine* whether a juvenile murderer is a "*rare*" defendant for which life imprisonment without parole is an appropriate sentence. Rather, as simply put by Justice KAGAN, "*we require* [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 US at ___; 132 S Ct at 2469. In pure obiter dicta, Justice KAGAN, writing for the five-Justice majority, *speculated* that life-imprisonment-without-parole sentences would be "uncommon." *Id.* This speculation was not essential to the holding of *Miller*, and the majority even acknowledged such. *Id.*; see also *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 437; 751 NW2d 8 (2008), quoting *Random House Webster's College Dictionary* (1997) (" '[O]biter dictum' " is defined as '1. an incidental *remark or opinion*. 2. a judicial opinion in a matter related but not essential to a case.' ") (Emphasis added).

In *Montgomery v Louisiana*, the United States Supreme Court found its holding in *Miller* to apply retroactively on collateral review as it was a new substantive rule of constitutional law. 577 US at ___; 136 S Ct at 736. Justice KENNEDY began his majority opinion by stating *the holding* of *Miller*:

> In *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the Court *held* that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light

> of the principles and purposes of juvenile sentencing. [*Montgomery*, 577 US at ___; 136 S Ct at 725 (emphasis added)].

Justice KENNEDY made no mention of a "truly rare juvenile" when stating *the holding* of *Miller*, and that is because such a concept was not essential to the holding. Nevertheless, he did constantly refer to the obiter dicta of *Miller* in which the majority expressed its *belief* of the "uncommon" nature of life-imprisonment-without-parole sentences. Yet, his repeated use of the word "rare," which he seemed to use synonymously with "uncommon," did not alter *Miller*'s holding nor did it constitute part of the holding in *Montgomery*. Rather, it was pure obiter dicta within his majority opinion. *Allison*, 481 Mich at 437.

iii. The majority in *Hyatt* erroneously wrenched the obiter dicta of *Miller* and *Montgomery* into a rule of law, which runs contrary to American legal jurisprudence recognizing that obiter dicta lacks the force of an adjudication and is not binding under the principle of *stare decisis*.

In *Hyatt*, the four-judge majority of the Court of Appeals found "it *necessary* to adhere to and *incorporate Miller* and *Montgomery*'s oft-repeated *warnings* about how life-without-parole sentences for juvenile offenders will be proportionate" when fashioning the appropriate standard of review on appeal. *Hyatt*, ___ Mich App at ___; slip op at 21 (emphasis added). The majority chose to expand the clear and concise holdings of *Miller* and *Montgomery* by adding an additional layer derived from the obiter dicta of those cases. Namely, the *Hyatt* majority required that courts "*must* begin with the understanding that, *in all but the rarest of circumstances*, a life-without-parole sentence will be disproportionate for the juvenile offender at issue." *Id.* at ___; slip op at 23 (emphasis added). There is no support for this "rule" within *Miller* or *Montgomery*. If it were a rule, the Court would have said so in both cases, and it did not. The People assert the *Hyatt* majority has interpreted this language out of context.

The People's position is supported by the lack of definition and direction within *Miller* and *Montgomery*—and also within *Hyatt*, itself—as to who is a "truly rare juvenile" and how to apply this standard. We posit this is because, as discussed *infra* and as noted by the *Miller* and *Montgomery* dissenters, such a standard attempts to create a law that cannot exist because it is founded in speculation. First, *Miller* never said what characteristics define a "rare" juvenile murderer who should be sentenced to life imprisonment without parole. Rather, the *Miller* Court focused on the requirement for an individualized sentence, insisting that a sentencer have the ability to consider the "mitigating qualities of youth." *Miller*, 567 US at ___; 132 S Ct at 2467. "By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment *proportionately* punishes a juvenile offender." *Id.* at ___; 132 S Ct at 2466 (emphasis added). In *Montgomery*, the Court recognized "that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." 577 US at ___; 136 S Ct at 733. Nevertheless, neither *Montgomery* nor *Miller* defined who the "rare" juvenile is—or *could* be. Likewise, the *Hyatt* majority does not provide any substance on how it expects a sentencing court to determine when a juvenile murder meets the "truly rare" classification it now imposes. In essence, the *Hyatt* majority created a shapeless and unnecessary rule.

Second, the *Hyatt* majority's implementation of the "truly rare juvenile" standard is premised on obiter dicta of *Miller* and *Montgomery*, not their holdings, which necessitates this Court to reverse the majority. "Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication." *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011). The People do

not disregard the language of *Miller* and *Montgomery* about the Court's *anticipated* rarity of life-imprisonment-without-parole sentences, but we rightfully recognize that such language is not *essential* to either of their holdings, and thus constitute obiter dicta. The *Miller* Court's "belief" that sentencing a juvenile murderer to life imprisonment without parole will be "uncommon" is not relevant or necessary to its holding; it is purely a speculative foreshadowing of what the Court expected to happen after its decision in *Miller*. In addition, the Court's repeated use of "rare" in *Montgomery*, as mentioned in the *Hyatt* majority's opinion, ___ Mich App at ___; slip op at 23, was not essential to its holding that *Miller* applied retroactively. As the language was not essential to the holdings or the reasoning supporting the holdings, the Court of Appeals erred when it chose to take this language and formulate a rule of law from it.

The theory underlying the *Hyatt* majority's holding has been properly rejected by at least two jurisdictions, directly. In *State v Lovette*, 758 SE2d 399, 408 (NC App, 2014), the juvenile murderer was sentenced to life imprisonment without parole post-*Miller* in accordance with North Carolina's statute, which is similar to MCL 769.25. The defendant argued that the sentencing judge erred imposing a life-imprisonment-without-parole sentence because *Miller* required such a sentence to be " 'uncommon' because of the difficulty of determining 'irreparable corruption,' " relying on the same language from *Miller* as the *Hyatt* majority. The *Lovette* court held, "Defendant's argument takes the statement regarding 'irreparable corruption' out of context and seemingly elevates it to a required finding, but this is simply *one of the factors* a trial court may consider." *Id.* (emphasis added), citing *Miller*, 567 US at ___; 132 S Ct at 2468. In addition, in *People v Palafox*, 231 Cal App 4th 68, 90; 179 Cal Rptr 3d 789 (2014), the California sentencing judge did not "find" the defendant "had a significant chance of rehabilitation; it simply refused to rule out the possibility." In rejecting the defendant's argument

that this lack of a factual finding entitled him to a non-life-without-parole sentence, the California appellate court poignantly stated:

> Because no one can see into the future or predict it with any accuracy, presumably there is always the possibility of rehabilitation—however remote—where a juvenile is concerned. That is the point of *Miller*. Despite this, *Miller* did not say the possibility of rehabilitation overrides all other relevant factors. If the potential for rehabilitation were dispositive—or even the preeminent factor—we do not believe the high court would simply have listed the possibility of rehabilitation as one of several factors applicable to an individualized determination whether to impose LWOP [life without parole] on a juvenile offender. (See *Miller*, 567 US at ___; 132 S Ct at 2468.) Rather, the court would have held LWOP categorically unconstitutional for juvenile offenders, or at least would have explicitly said such a sentence cannot constitutionally stand in face of a potential for rehabilitation.
>
> That the court expressed belief appropriate occasions for sentencing juveniles to LWOP would be rare because of the difficulty distinguishing "between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption' " (*Miller*, 567 US at ___; 132 S Ct at 2469) does not change this. *Miller* made clear that a sentencer has the ability to make such a judgment in homicide cases (*ibid*.): The decision "mandates *only* that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." (*Id.* at ___; 132 S Ct at 2471 [italics added].) [*Palafox*, 231 Cal App 4th at 90–91 (citations and emphasis in original)].

Accordingly, the People submit that the foregoing cases properly analyze *Miller*'s use of the language "uncommon," "rare," "possibility of rehabilitation," and "irreparable corruption" in their proper context, as factors to consider and evaluate when imposing a proportionate sentence, not as part of the holding of *Miller* creating a rule of law.

Addressing the anticipated counter-argument, that the language was judicial dictum and should be given force of law, this argument simply cannot hold water. Nothing about *Miller* or *Montgomery*'s expression of the speculative "rare" juvenile who will be sentenced to an

anticipated "uncommon" life-imprisonment-without-parole sentence was integral, in any way, to the holding of either case. Thus, the language within the opinions was obiter dicta and the *Hyatt* majority erred in treating it as judicial dicta. If the language was judicial dicta, thereby having force of law, then the United States Supreme Court would be substituting its own judgment for that of sentencers in all instances—which is what the *Hyatt* majority has done in its opinion as discussed *infra*. If the U.S. Supreme Court had *held* that such sentences would be "rare," they would have been pre-judging every case, substituting their own opinion for that of the sentencer. Clearly, the *Hyatt* majority's opinion on this issue must be reversed as it is a material misstatement of the law and will cause irreparable injustice.

While the United States Supreme Court is the ultimate arbiter of issues involving the Federal Constitution, the seven Justices, who at any time comprise the Court, do not have the power to see into the future, and thus cannot rightfully predict the sentencing determinations of sentencers. Hence, the Court's purposeful use of the word "believe" instead of "mandate," "require," or "hold" in *Miller*. If the Court used the word "held" or similar language, then the Court would wrongly constrain the discretion afforded to sentencers. The *Hyatt* majority now seeks to do just that by redefining *Miller* and *Montgomery*'s holdings and imposing an untenable standard, while neglecting to define the concept of a "truly rare juvenile" that it wants sentencing courts to employ and thereby leaving no guidance for sentencing courts in Michigan. One must scratch their head at the *Hyatt* majority's statements—not to mention the United States Supreme Court's obiter dicta—because in cases where a juvenile murderer faces life imprisonment without parole, we are always talking about a "rare" juvenile who has committed murder as juveniles do not go about their daily lives doing so. Hence, the "rare" juvenile will always be in front of the court in this regard. The dissenters in *Miller* and *Montgomery* correctly recognize the

incongruent arguments put forth by their respective counterparts, and the People assert the dissenters have the more logical arguments.

iv. The dissenting Justices in *Miller* and *Montgomery* correctly rebuked their respective majorities for providing their unnecessary "beliefs" about the imposition of life-imprisonment-without-parole sentences, noting that such language was not essential to the holdings of either case, and consequently, the *Hyatt* majority erred when it treated those "beliefs" as rules of law.

Writing for four dissenting Justices in *Miller*, Chief Justice ROBERTS aptly stated, "Determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy. Our role, however, is to apply the law, not to answer such questions." 567 US at ___; 132 S Ct at 2477 (ROBERTS, C.J., dissenting). The *Hyatt* majority has chosen to focus on the moral question and associated social policy related to juvenile murderer sentences, which is the inappropriate track, by constantly referencing the "rarity" of life-imprisonment-without-parole sentences, which is not a legal decision founded on precedent.

Continuing his analysis of *Miller*'s flawed reasoning, Chief Justice ROBERTS noted:

> *Roper* reasoned that the death penalty was not needed to deter juvenile murderers in part because "life imprisonment without the possibility of parole" was available. [543 US] at 572 [ ]. In a classic bait and switch, the Court now tells state legislatures that—*Roper*'s promise notwithstanding—they do not have power to guarantee that once someone commits a heinous murder, he will never do so again. [567 US at ___; 132 S Ct at 2481 (ROBERTS, C.J., dissenting)].

This particular portion of Chief Justice ROBERTS's dissent resonates loudly in this case. The *Hyatt* majority has now said that only "rare" juveniles may be sentenced to life imprisonment without parole, yet such a reading of *Miller*'s holding is inconsistent with the proclamation in *Roper*, which the *Hyatt* majority relies on to support its argument. *Roper* guaranteed that life

imprisonment without parole was the appropriate deterrent, which made the death penalty unnecessary for juvenile murderers. *Hyatt* has gone beyond the bounds of *Miller*'s holding and annihilated the deterrent by essentially making it unavailable based on its own erroneous rule of law.

The foregoing argument is highlight by Chief Justice ROBERTS's direct statement criticizing the *Miller* Court for going beyond the legal doctrine necessary to decide *Miller*, and instead adorning itself with the power to substitute its judgment for that of the legislative body—and the sentencer—as to appropriate sentencing punishment. Chief Justice ROBERTS wrote:

> Today's decision does not offer *Roper* and *Graham*'s false promises of restraint. Indeed, the Court's opinion suggests that it is merely a way station on the path to further judicial displacement of the legislative role in prescribing appropriate punishment for crime. The Court's analysis focuses on the mandatory nature of the sentences in this case. But then—*although doing so is entirely unnecessary to the rule it announces—the Court states that even when a life without parole sentence is not mandatory, "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon*." Today's holding may be limited to mandatory sentences, but the Court has already announced that discretionary life without parole for juveniles should be "uncommon"—or, to use a common synonym, "unusual."
>
> Indeed, the Court's *gratuitous prediction* appears to be nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges. If that invitation is widely accepted and such sentences for juvenile offenders do in fact become "uncommon," the Court will have bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits them. [567 US at ___; 132 S Ct at 2481 (ROBERTS, C.J., dissenting) (emphasis added and internal citations omitted)].

This passage from Chief Justice ROBERTS's dissent, to use the common idiom, "hits the nail on the head!" Relying on the obiter dicta, or to use Chief Justice ROBERTS's words, "gratuitous prediction," the *Hyatt* majority provided an unnecessary and underdeveloped analysis of what it

deemed "the truly rare juvenile" based on the superfluous language of *Miller*. *Hyatt*, ___ Mich App at ___; slip op at 22–23. Consequently, the majority incorrectly concluded that, at sentencing, "a trial court *must* begin with the understanding that, in all but the rarest of circumstances, a life-without-parole sentence will be disproportionate for the juvenile offender. Thus, a sentencing court *must* begin its analysis with the understanding that life-without-parole is, unequivocally, only appropriate in rare cases." *Id.* at ___; slip op at 23. This conclusion is clearly erroneous because nothing in *Miller* suggests this was part of *Miller*'s holding, and the *Hyatt* majority's conclusion is explicitly repudiated by Chief Justice ROBERTS's analysis—which, we note, the *Miller* majority did not rebut. Hence, it must be reversed.

Chief Justice ROBERTS was not alone in his observations about *Miller*'s gratuitous use of obiter dicta and judicial overreach. Justice THOMAS, joined by Justice SCALIA, similarly recognized the majority's unnecessary imposition of his its own moral beliefs within *Miller*:

> Today, the Court makes clear that, even though its decision leaves intact the discretionary imposition of life-without-parole sentences for juvenile homicide offenders, *it "think[s] appropriate occasions for sentencing juveniles to [life without parole] will be uncommon." That statement may well cause trial judges to shy away from imposing life without parole sentences and embolden appellate judges to set them aside when they are imposed*. And, when a future petitioner seeks a categorical ban on sentences of life without parole for juvenile homicide offenders, this Court will most assuredly look to the "actual sentencing practices" triggered by this case. The Court has, thus, gone from "merely" divining the societal consensus of today to shaping the societal consensus of tomorrow. [567 US at ___; 132 S Ct at 2486 (THOMAS, J., dissenting) (emphasis added and internal citations omitted)].

Justice SCALIA, joined by Justice ALITO, also wrote a dissenting opinion, expressing the same views held by Chief Justice ROBERTS and Justice THOMAS, proclaiming, "The majority *goes out of its way to express the view* that the imposition of a sentence of life without parole on a 'child' (i.e., a murderer under the age of 18) should be uncommon." 567 US at ___; 132 S Ct at 2489

(SCALIA, J., dissenting) (emphasis added). In his dissent in *Montgomery*, Justice SCALIA, joined by Justices THOMAS and ALITO, expanded on his *Miller* dissent, stating, "[I]t is impossible to get past *Miller*'s unambiguous statement that '[o]ur decision does not categorically bar a penalty for a class of offenders' and 'mandates only that a sentencer follow a certain process . . . before imposing a particular penalty. It is plain as day that the majority is not applying *Miller*, but rewriting it." 577 US at ___; 136 S Ct at 743 (SCALIA, J., dissenting) (internal citation omitted).

v. Conclusion

The *Hyatt* majority has chosen to use the obiter dicta from *Miller* and *Montgomery* and turn it into an unworkable rule of law that is lacking in foundation, definition, and practicality. As noted by the dissenters in those cases, nothing about the "gratuitous prediction" that life-without-parole sentences for juvenile murderers will be "uncommon" or "rare" has any impact or relation to the essential holdings of *Miller* or *Montgomery*. Based on the *Hyatt* majority's rationale, every appellate court may now "predict" how its ruling should be implemented in the future and thereby create a rule of law that must be followed under *stare decisis*. Such a conclusion is illogical and against American jurisprudence.

The dissenting Justices in *Miller* and *Montgomery* explicitly—and correctly—recognized the invalid assumption and conclusion that the *Hyatt* majority chose to implement. In fact, *Miller* *never* held that *only* a "truly rare juvenile" could be sentenced to life imprisonment without parole. To the contrary, the *Miller* Court explicitly acknowledged, "[W]e do not foreclose a sentencer's ability to make that judgment [life imprisonment without parole] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 US ___; 132 S Ct at

2649 (footnote omitted). For the foregoing reasons, this Honorable Court must reverse the clearly erroneous decision of the Court of Appeals.

II. Sentencing rests exclusively within the bailiwick of the sentencing court. Michigan appellate courts review sentences for an abuse of discretion, paying deference to a sentencing court's unique position to hear the evidence, evaluate the credibility of witnesses, and to its ultimate decision. The *Hyatt* majority's "heightened" abuse-of-discretion standard of review is clearly erroneous because it is not properly founded in the law, fails to afford proper deference to the sentencing court, and is merely a gambit to substitute the judgment of an appellate court for that of the better-situated sentencing judge.

a. Issue Preservation

In relation with the foregoing arguments, the *Hyatt* majority created an erroneous standard of review, through which it does not afford proper deference to the trial court's sentencing determination. The People properly preserved this issue as part of the arguments on appeal in front of the original panel and the conflict panel of the Court of Appeals. MCR 7.303(B)(1); MCR 7.305(B)(3); MCR 7.305(B)(5)(a).

b. Standard of Review

While identifying the *Hyatt* majority's understanding of the law may be a question of fact, "whether that understanding is a misapprehension is a question of law, to which [this Court] applies a *de novo* standard of review." *People v Moore*, 468 Mich 573, 579; 664 NW2d 700 (2003).

c. Argument

i. Introduction

The *Hyatt* majority initially stated the appropriate standard of review for sentences under MCL 769.25, referring to the "common three-fold standard":

> Any fact-finding by the trial court is to be reviewed for clear error, any questions of law are to be reviewed *de novo*, and the court's ultimate determination as to the sentence imposed is for an abuse of discretion. See *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (describing the standard for reviewing a sentencing court's findings of fact and conclusions of law); [*People v*] *Milbourn*, 435 Mich [630,] 636, 654[; 461 NW2d 440 (1990)] (applying the abuse-

> of-discretion standard to sentencing review). [*Hyatt*, ___ Mich App at ___; slip op at 25.]

The People agree with the majority that this "common three-fold standard" is the appropriate standard of review. Yet, the majority, again relying on the obiter dicta of *Miller* and *Montgomery*, added an additional erroneous layer to the standard of review, with which the People do not agree. The majority stated:

> However, this standard, particularly the abuse-of-discretion standard, requires further explanation in this context. Because of the unique nature of the punishment of a life-without-parole sentence for juveniles and the mitigating qualities of youth, we are obligated to clarify what the abuse-of-discretion standard should look like in the context of life-without-parole sentences for juveniles. As will be discussed in more detail below, we hold that the imposition of a juvenile life-without-parole sentence requires a *heightened degree of scrutiny* regarding whether a life-without-parole sentence is proportionate to a particular juvenile offender, and even under this deferential standard, *an appellate court should view such a sentence as inherently suspect*. [*Id.* at ___; slip op at 25–26 (emphasis added).]

The majority, while acknowledging the appropriate abuse-of-discretion standard, completely altered the standard and created a "heightened" abuse-of-discretion standard, which is nothing more than an appellate court's substitution of judgment for that of the sentencing judge, which must be overturned. Notably, here, the *Hyatt* majority *never* found that the sentencing judge abused her discretion when imposing a life-imprisonment-without-parole sentence.

ii. <u>The standard of review for sentences under MCL 769.25 is the well-accepted abuse-of-discretion standard, which properly affords proper deference to the sentencing judge's ultimate sentencing decision, not the *Hyatt* majority's clearly erroneous "heightened" abuse-of-discretion standard.</u>

The standard of review is the keystone for an appellate court during its decision-making process. The standard of review imposes a constraint on a court, instructing a court to act within certain boundaries, without which there would be unfettered discretion. Particularly, the standard

of review applied on appeal is of the utmost importance in the criminal sentencing process, which this Court recognized in *People v Coles*, 417 Mich 523, 528–29; 339 NW2d 440 (1983), overruled in part by *Mibourn*, 435 Mich at 654. Sentencing is not a function of the appellate courts; rather, sentencing rests *exclusively* within the province of the sentencing judge due to the sentencing judge's unique position in relation to the facts, witnesses, and credibility determinations made therefrom. *Coles*, 417 Mich 523; *Mibourn*, 435 Mich 630. This affirmation has been subsequently repeated and accepted within Michigan jurisprudence. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

In accord with this recognition of deference, the "abuse of discretion" standard, which predominated prior to and after the enactment of Michigan's sentencing guidelines, continues to be the underpinning on appellate review for *all* sentences in Michigan. See *Hardy*, 494 Mich at 437–38; *Babcock*, 469 Mich at 253–54; *People v Hegwood*, 465 Mich 432, 437; 636 NW2d 127 (2001). "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." *Babcock*, 469 Mich at 269. At sentencing, a judge is given wide latitude when imposing a sentence within the confines of the law, and only when he or she goes beyond any reasonable position is he or she overturned. In light of *Milbourn*'s principle of proportionality, the sentence should be examined for "reasonableness." 435 Mich 630. This is the legally appropriate standard of review on the ultimate sentence imposed under MCL 769.25, not the "heightened" abuse-of-discretion standard created by the *Hyatt* majority, which is, in actuality, a *de novo* review.

iii. "Meaningful appellate review" occurs when the sentencing judge complies with MCL 769.25, considering all relevant evidence, stating the aggravating and mitigating circumstances on the record, and where the appellate court properly defers to the sentencing judge's unique position with respect to sentencing and does not substitute its own judgment for that of the sentencing judge.

The *Hyatt* majority correctly recognized that a juvenile murderer's sentence under MCL 769.25 is not exempt from the abuse-of-discretion standard, but it then exempted it. The *Hyatt* majority continuously latches onto the obiter dicta of *Miller* and *Montgomery*, which *speculates* that life-without-parole sentences will be "rare" or "uncommon." Hence, the majority wants appellate courts to view any such sentences as "inherently suspect." There is no basis for this conclusion or holding. As explained *supra*, Section I, *Miller* and *Montgomery*'s holdings are explicitly narrow. *Miller* held mandatory sentences of life imprisonment without parole on juvenile murderers unconstitutional. 567 US ___; 132 S Ct at 2649. *Montgomery* then held *Miller* to be retroactive to cases on collateral review in all courts throughout the country. 577 US at ___; 136 S Ct at 736. There is no holding in either case that orders courts *not* to impose life imprisonment without parole *unless* the juvenile *is found* to be "rare."

For some reason, the majority thinks that "meaningful appellate review" cannot occur using the appropriate abuse-of-discretion standard. *Hyatt*, ___ Mich App at ___; slip op at 26. The majority's conclusion is wrong. To begin, every criminal statute prohibiting conduct contains a "maximum" statutory sentence (then there are also the habitualization statutes). The *Hyatt* majority argues that imposing the "maximum punishment" of life imprisonment without parole is the harshest punishment, which must be met with skepticism—which is based on the obiter dicta of *Miller* and *Montgomery*. *Id.* By this logic, every "maximum" sentence must also be met with skepticism. The majority's reasoning is consequently incorrect. The majority bases its holding on the fear that trial courts will "rubber-stamp" juvenile murderers' sentences with

life without parole. Such a fear is unfounded and illogical. Looking at the history of sentencing in Michigan, generally, there has never been such "rubber-stamping" regarding any type of sentencing, and the majority fails to cite any such bases for its fear.

The majority ignores the explicit procedure of MCL 769.25 that provides the appellate court with ability to conduct "meaningful appellate review" under the correct abuse-of-discretion standard. After the prosecution files a motion seeking life imprisonment without parole, MCL 769.25(6) instructs the sentencing judge to "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*, 576 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." At the hearing, the Legislature has instructed the court to "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(7). There is no *law* that requires a sentencing judge to view the sentence of life imprisonment without parole as a "last resort," so to say, before imposing it, or allowing an appellate court to employ a heightened standard of review. Rather, the ruling in *Miller* is clear, the sentence must be individualized, taking into consideration the "mitigating qualities of youth." 567 US at ___; 132 S Ct at 2467.

The analysis in this case is akin to that undertaken by this Court when interpreting the then-mandatory nature of the sentencing guidelines in *People v Babcock*, 496 Mich 247, in which the Court applied the abuse of discretion standard to sentence departures. In *Babcock*, the question presented was "whether the trial court articulated a substantial and compelling reason, as required under MCL 769.34(3), to justify its downward departure from the statutory

sentencing guidelines." *Babcock*, 496 Mich at 251. The People relate the ability of the sentencing court to impose an upward "departure sentence" under the then-mandatory guidelines similar to how the *Hyatt* majority views the imposition of life imprisonment without parole as the "harshest punishment." A sentencing court could impose the harshest sentence via an upward departure.

The *Babcock* Court noted, "The Legislature has subscribed to this principle of proportionality in establishing mandatory sentences as well as minimum and maximum sentences for certain offenses." 469 Mich at 263, citing *Milbourn*, 435 Mich at 635–36. Our Legislature has similarly subscribed to the same principal of proportionality when establishing the term-of-years sentence or life-imprisonment-without-parole sentence under MCL 769.25. Previously, the sentencing courts were required to state their substantial and compelling reasons on the record when imposing a sentence outside of the guidelines. Similarly, under MCL 769.25(7), sentencing courts are required to state "on the record the aggravating and mitigating circumstances considered by the court and the court's reasoning supporting the sentence imposed." The *Babcock* Court held, "[A]ppellate courts must proceed with caution grounded in the inherent limitations of the appellate perspective" "giving [the sentencing court's] determination deference" when reviewing whether the court had a substantial and compelling reasons to depart from the guidelines. *Id.* at 270. "The structure and content of the sentencing guidelines, as well as the organization of the appellate system itself, plainly reveal the Legislature's recognition that the trial court is optimally situated to understand a criminal case and to craft an appropriate sentence for one convicted in such a case." *Babcock*, 469 Mich at 267. Likewise, when reviewing sentences under MCL 769.25, appellate courts must afford the same deference to sentencing judges because they are in a better position to make such a determination given their extensive knowledge of the facts of the case and familiarity with the facts and

circumstances of the offender. *Babcock*, 469 Mich at 270. There is no principled basis in the law to depart from the abuse of discretion standard.

iv. Other jurisdictions properly adopt the common abuse-of-discretion standard when reviewing juvenile life-imprisonment-without-parole sentences post-*Miller*, providing proper deference to sentencing judges, which Michigan should also adopt.

The People are not alone in our foregoing position. In *State v Lovette*, 758 SE2d 399 (NC App, 2014), the North Carolina Court of Appeals considered the appropriate standard of review applied to a juvenile murderer's life-imprisonment-without-parole sentence. The juvenile defendant was convicted of first-degree murder and was mandatorily sentenced to life imprisonment without parole prior to *Miller*. After *Miller*, North Carolina enacted a statute providing for life imprisonment without parole after a hearing, North Carolina General Statute § 15A–1340.19A *et seq.*, similar to Michigan's statute at issue. The defendant received a hearing and thereafter the sentencing court imposed a sentence of life imprisonment without parole. *Lovette*, 758 SE2d at 401–03.

First, when considering how to review the sentencing court's findings of mitigating and aggravating circumstances, the *Lovette* court found "no reason to depart from our body of case law which has established that we review challenged findings of fact for competent evidence to support the finding." 758 SE2d at 407 (citation omitted). Second, the court "consider[ed] *de novo* if the trial court's findings of fact . . . support[ed] its conclusion of law." *Id.* at 408. Finally, the *Lovette* court reviewed the imposed sentence for an abuse of discretion, which, under North Carolina jurisprudence, "occurs when a ruling is manifestly unsupported by reason, which is to say it is so arbitrary that it could not have been the result of a reasoned decision." *State v Murchison*, 367 NC 461; 758 SE2d 356 (2014) (citation omitted). The court found that the sentencing court's findings of fact were not clearly erroneous and were support by the law, and

ultimately found "Defendant has not demonstrated an abuse of discretion in how the trial court chose to weigh any factors as compared to each other nor in how the trial court weighed 'all the circumstances of the offenses' in light of them." *Lovette*, 758 SE2d at 408.[5]

In *Commonwealth v Seagraves*, 103 A3d 839 (Pa Super 2014) and *Commonwealth v Batts*, 125 A3d 33, 34–38 (Pa Super 2015), the defendants were each convicted of first-degree murder, among other convictions, and were sentenced to life imprisonment without parole under Pennsylvania's statute, 18 PaCSA 1102.1, which is similar to MCL 769.25, and also requires a similar hearing pursuant to *Miller*, where a defendant is permitted to present mitigating circumstances. In *Seagraves*, the defendant challenged his sentence under the common abuse-of-discretion standard, 103 A3d at 841, which occurs when "the trial judge overrides or misapplies the law, or exercises judgment in a manifestly unreasonable manner, or renders a decision based on partiality, prejudice, bias or ill-will[]" *Commonwealth v Handfield*, 34 A3d 187, 207–08 (Pa Super 2011). Yet, in *Batts*, the defendant challenged the court's life-imprisonment-without-parole sentence under a theory of sufficiency of the evidence to impose that sentence, arguing a *de novo* standard applied. 125 A3d at 42. The *Batts* court rejected the defendant's arguments, finding his arguments challenged "the discretionary aspects of his sentence" and, thus, the court applied Pennsylvania's abuse-of-discretion standard. *Id.* at 42–43, citing *Seagraves*, 103 A3d at

[5] Notably, the sentencing court had actually made findings that "defendant [was] not 'irretrievably corrupt' and his 'possibility of rehabilitation[,]' yet still sentenced him to life imprisonment without parole. The *Lovette* court stated:

> [T]hese findings of fact did not ultimately require the trial court to sentence defendant to a lesser sentence than life imprisonment without parole as the trial court could consider all of the factors and determine "whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole." [*State v Lovette*, 758 SE2d 408 (2014) (citation omitted).]

842. In each case, the sentences of life imprisonment without parole were upheld under the abuse-of-discretion standard, which is similar to Michigan's abuse-of-discretion standard.

Most notably, the *Batts* court rejected the defendant's argument that the court "should go beyond the affirmative constitutional holdings of *Miller* and . . . impose a heightened burden of proof, and a corresponding more stringent appellate review, in juvenile life without parole cases, akin to death penalty cases." 125 A3d at 43. Defendant's argument is the same action taken by the *Hyatt* majority. In rejecting the defendant's argument, the *Batts* court simply held, "Absent a specific directive from our Supreme Court or the General Assembly to do so, we decline to expand *the narrow holding in Miller*." *Id.* (emphasis added). This Court should take the same stance and keep to the narrow holdings of *Miller* and *Montgomery*, and not engage in judicial activism by expanding their holdings, which would essentially *create* law. "[*Miller*] *did not* instruct the trial court as to a heightened burden of proof or different procedure for considering those age-related factors." *Id.* at 45.

California also adopts the common abuse-of-discretion standard when reviewing juvenile murderer life without parole sentences under its respective statute, Cal Penal Code 190.5. See *Palafox*, 231 Cal App 4th 68 (upholding life-imprisonment-without-parole sentences for juvenile murderers under the common abuse-of-discretion standard). In California law, an abuse of discretion occurs when trial court's ruling falls outside the bounds of reason or the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. *People v Carrington*, 47 Cal 4th 145, 195; 211 P3d 617; 97 Cal Rptr 3d 117 (2009); *People v Osband*, 13 Cal 4th 622, 666; 919 P2d 640; 55 Cal Rptr 2d 26 (1996).

v. Conclusion

Post-*Miller*, each of the jurisdictions applying their respective abuse-of-discretion standards, which are each similar to Michigan's standard, to sentences for juvenile murderers have properly afforded deference to the sentencing judge, recognizing that it is not the role of an appellate court to substitute its judgment for that of the sentencing judge as to the appropriate sentence. The *Hyatt* majority, however, chose to create a standard that *is* judicial substitution of judgment. While saying that it is reviewing these sentences "under the abuse-of-discretion standard," the majority, nonetheless, does an about-face and says they are "inherently suspect" and must be afforded a "heightened" standard of review. *Hyatt*, ___ Mich App at ___; slip op at 25–26. This cannot be allowed to stand. The *Hyatt* majority seeks to substitute its misplaced judgment, which is based on obiter dicta of *Miller* and *Montgomery*, for that of the better-situated sentencing judge because the majority believes life-imprisonment-without-parole sentences for juvenile murderers should be "uncommon." Chief Justice ROBERTS aptly noted, which rings true in this case, "the Court's *gratuitous prediction* appears to be nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges." *Miller*, 567 US at ___; 132 S Ct at 2481 (ROBERTS, C.J., dissenting) (emphasis added). This Court must not allow the appellate court to take control of sentencing decisions based on nonsensical predications. The Court must impose the commonly accepted abuse-of-discretion standard and reject the *Hyatt* majority's erroneous "heightened" abuse-of-discretion standard.

III. This Court must reverse the *Hyatt* majority's decision to remand for resentencing because the majority completely ignored the applicable abuse-of-discretion standard of review and the requisite deference to be afforded to the sentencing judge when the majority employed its newly created "heightened" abuse-of-discretion standard of review, essentially conducting a *de novo* review of the facts and sentence, and where the sentence imposed was proportionate and within the range authorized by the Legislature.

a. Issue Preservation

In conjunction with all of the foregoing, this Honorable Court should affirm the sentencing judge's decision to sentence Defendant to life imprisonment without parole. This is the ultimate contention on appeal and is properly preserved. MCR 7.303(B)(1); MCR 7.305(B)(3); MCR 7.305(B)(5)(a).

b. Standard of Review

This Court should apply the correct standard of review, which is, as the *Hyatt* majority initially stated, "the common three-fold standard," and nothing more and nothing less. *Hyatt*, ___ Mich App at ___; slip op at 25. Factual findings made by the sentencing judge are reviewed for clear error. *Id.*, citing *Hardy*, 494 Mich at 438. "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Massey v Massey*, 462 Mich 375, 379; 614 NW2d 70 (2000). The interpretation and application of the law to the facts are questions of law to be reviewed *de novo*. *Hyatt*, ___ Mich App at ___; slip op at 25, citing *Hardy*, 494 Mich at 438. Finally, "the court's ultimate determination as to the sentence imposed is for an abuse of discretion." *Hyatt*, ___ Mich App at ___; slip op at 25, citing *Milbourn*, 435 at 654. "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." *Babcock*, 469 Mich at 269. "A mere difference in judicial opinion does not establish an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

In association with this standard of review, Michigan courts are guided by the principle of proportionality as found in *People v Milbourn*, 435 Mich 630. "Where a given case does not present a combination of circumstances placing the offender in either the most serious or least threatening class with respect to the particular crime, then the trial court is not justified in imposing the maximum or minimum penalty, respectively." *Id.* at 654.

c. Argument

i. MCL 769.25 codified the holding of *Miller v Alabama* and instructs sentencing courts to individualize a juvenile murderer's sentence by considering all relevant evidence, particularly those distinctive attributes of youth.

To conform to *Miller*'s individualized-sentencing mandate, a sentencing court must consider all relevant evidence bearing on the "distinctive attributes of youth" discussed in *Miller* and how those attributes "diminish the penological justifications for imposing the harshest sentences on juvenile offenders." *Miller*, 567 US at ___; 132 S Ct at 2465. In order to accomplish an individualized sentence, the Court listed "considerations," including, but not limited to:

> (a) the character and record of the individual offender [and] the circumstances of the offense, (b) the chronological age of the minor, (c) the background and mental and emotional development of a youthful defendant, (d) the family and home environment, (e) 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 [the juvenile], (f) whether the juvenile might have been charged and convicted of a lesser offense if not for incompetencies associated with youth, and (g) the potential for rehabilitation. [*People v Carp*, 298 Mich App 472, 532; 828 NW2d 685 (2012), citing *Miller*, 567 US at ___; 132 S Ct at 2467–68.]

MCL 769.25(6) further provides that in addition to the "*Miller* factors," a sentencing court "may consider any other criteria relevant to its decision." Yet, to be sure, not every factor will necessarily be relevant in every case.

ii. The sentencing judge engaged in a thorough analysis in compliance with MCL 769.25 before properly exercising her discretion to sentence Defendant to life imprisonment without parole.

On December 29, 2014, the sentencing court specified its considerations on the record pertaining to the aggravating and mitigating factors relating to Defendant's sentence. The trial court summarized the *Miller* factors and first considered that Defendant was seventeen years old, almost eighteen years old, at the time of the offense. (S, 4–7.) The court ultimately determined Defendant's age was not a significant mitigating factor due to the premeditated heinous nature of the crime. (S, 9.) Second, the court considered his unstable family background. (S, 7.) Third, "his school records[,] the Court was unhappy to see that there was a pattern of disrespectful and disorderly behavior that led to numerous suspensions and even threats to teachers." (S, 8.) "[T]here were counseling records that [his] mother . . . brought the defendant to counseling because the problems with stealing and lying, smoking of weed and cigarettes, and he was perceived to be a youth out of control who did just what he pleased. There was even a reference to a gun problem two years before the homicide of Mr. Mick." (S, 8.) Fourth, the court considered the circumstances surrounding the homicide. The court focused on "Mr. Hyatt's participation[,] this was a very well planned out incident. This did not just happen on the spur of the moment." (S, 8.) The sentencing court summarized the facts of the case as follows:

> The three young men, two of them were cousins of Mr. Perkins including Mr. Hyatt and Mr. Aaron Williams planned this out. They wanted to steal the gun that belonged to the security guard, Mr. Mick. In order to do that, they had to have another gun for reasons I'm not too clear on but they did decide to get another gun and certainly they planned out how to get the other gun to help them get Mr. Mick's gun. And they even caug--concocted a loose [sic] to get the security guard out of his car so that he would be an easier target, an easier victim from whom to steal the gun. As I said this other gun was procured with help from Mr. Aaron Williams. And what is most disturbing of all of course is that Mr. Mick was shot not once but four times. This defendant was the

> person who shot that gun. It certainly was not an accident in my opinion. But a well-planned event both before leading up to the incident to get the gun also to get Mr. Mick out of his car and then the execution in the wee hours of the morning in the parking lot where Mr. Mick was serving as a security guard. [S, 8–9.]

Next, the court rejected Defendant's statement that he was "high on drugs" because "certainly that [did] not come across in any of [ ] the videos or any of the interviews that were conducted with him." (S, 10.)

Finally, as to the "potential for rehabilitation," the sentencing court did believe that Defendant "is capable of learning and did actually accomplish something while he's been incarcerated," speaking about his obtainment of his G.E.D. (S, 11.) The court further considered that Dr. Clark found Defendant "to be a seriously disturbed young man," who "keeps his problems inside not expressing them or dealing with them effectively." (S, 10.) That he may experience periods of marked emotional cognitive or behavioral dysfunction. (S, 10.) "[Dr. Clark] did not see him as a leader." (S, 10.) His adolescence is marred by extreme turmoil. (S, 10–11.) "Dr. Clark found the defendant to be very defiant and easily led. At page forty-eight of the testimony she said he was incapable of resisting negative influences." (S, 11.) The court took seriously Dr. Clark's testimony:

> Doctor Clark thought within five years he would not be able to be reformed. She was very concerned looking out decades perhaps as many as forty years. She could not say that he would be reformed or have a potential for rehabilitation. She said he is not a sensitive compassionate young man. And really no way of predicting whether he is going to be able to change his course. She said that to change would require quote in quote extreme effort and dedication on his part, end quote. Quote, it depends on him, end quote. As I've said five years out, prognosis in her view is very, very bleak, end quote. She cannot say where looking out as far as forty years but would require extreme effort on his part. She did feel that much of his behavior was given [sic] by drugs. And noted, of course, that we don't think he'll be likely to be able to receive

> drugs and have them on a regular basis in the prison setting, at least we hope not. [S, 11–12.]

Considering Defendant Hyatt's background as presented through the testimony and records, considering the factors set forth in *Miller*, the nature of the crime itself and the defendant's level of participation as the actual shooter in this case, the court reasoned that "the principle of proportionality requires this Court to sentence him to life in the State prison without parole." (S, 12.)

The sentencing judge complied with the mandates of *Miller* and MCL 769.25 before sentencing Defendant to life imprisonment without parole. All of the sentencing judge's factual findings were supported by evidence within the record and, thus, were not clearly erroneous. Nor was the sentencing judge wrong in her application of the law to the facts. Most importantly, the sentencing judge properly exercised her discretion within the confines of the law when imposing what she found to be a proportionate sentence in this case. The *Hyatt* majority erroneously, seriously—and perhaps intentionally—overlooks the sentencing judge's analysis in order to remand this case for further consideration.

iii. <u>The *Hyatt* majority clearly erred as a matter of law when substituting its own judgment for that of the sentencing judge when it employed an erroneous "heightened" standard of review, disregarding the sentencing judge's valid legal and factual considerations and proper exercise of discretion, and erroneously remanded the case for "further consideration."</u>

The majority initially notes, "An appellate court . . . is to conduct a searching inquiry and view inherently suspect life-without-parole sentence imposed on a juvenile offender under MCL 769.25." *Hyatt*, ___ Mich App at ___; slip op at 27. This, again, is a clearly erroneous standard of review. The sentencing judge conducts the "searching inquiry," not the appellate court. The appellate court is to review the record to determine whether the sentencing judge abused his or her discretion, similar to all sentences. This is another example of how the *Hyatt* majority chose

to substitute its judgment for that of the trial court, which is essentially a *de novo* review. The *Hyatt* majority has now informed sentencing judges that life-imprisonment-without-parole sentences are *pre-judged* on appeal as "wrong," even though the Legislature has authorized such sentences. This is materially unjust.

Next, the majority found "the trial court committed an error of law by failing to adhere to *Miller* and *Montgomery*'s directive about the rarity with which a life-without-parole sentence should be imposed." *Id.* at ___; slip op at 27–28. As discussed *supra*, Section I, the majority misconstrues the obiter dicta of *Miller* and *Montgomery* as "directives," when they are nothing more than speculation. *Miller* made clear that *a sentencer* has the ability to make such a judgment in homicide cases. The decision "mandates *only* that *a sentencer* follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Miller*, 567 US at ___; 132 S Ct at 2471 (emphasis added). The majority *presumes, without any factual basis*, that "the [sentencing] court gave no credence to *Miller*'s repeated warnings that a life-without-parole sentence should only be imposed on the rare or uncommon juvenile offender." *Id.* at ___; slip op at 28. As noted by the *Hyatt* conflict panel dissenting judges, "[W]hile the court did not explicitly use the term 'rare' as employed in *Miller* [ ] and *Montgomery* [ ], the record makes clear that the court applied the applicable concepts from *Miller* in finding that a sentence of life without parole was appropriate despite Defendant Hyatt's status as a juvenile." *Id.* at ___; slip op at 1–2 (METER, J., concurring in part and dissenting in part). The dissent has the better position under the law and common sense. It would seem all a sentencing judge would have to do under the majority's rationale is mention the word "rare" to satisfy their concern. The People are left wondering how the majority can ignore the lengthy hearing and analysis, *which were all done pursuant to Miller*.

The majority continued to focus intently on one portion of the sentencing judge's analysis while disregarding everything else. The majority believed the "trial court . . . emphasized the opinion of the psychologist who testified at the *Miller* hearing that defendant *Hyatt*'s prognosis for change *in the next five years* was poor." *Id.* at ___; slip op 28. The dissenting judges rightfully called out the majority's narrow-minded analysis by stating, "This statement, however, was merely one aspect of the testimony and other evidence appropriately taken into consideration by the sentencing court." *Id.* at ___; slip op at 1 (METER, J., concurring in part and dissenting in part). The dissenting judges correctly considered all of the evidence considered by the sentencing judge, including: "defendant Hyatt was the actual shooter, had a history of assaultive behavior, appeared to a counselor to have no conscience, showed no remorse or concern over the crimes, was 'disconnected from societal morals and mores,' had 'serious maladjustment,' and was 17 years old at the time of the offenses." *Id.* at ___; slip op at 2 (METER, J., concurring in part and dissenting in part). The dissenting judges paid proper deference to the sentencing judge's determination, whereas the majority merely substituted its own judgment for that of the sentencing judge, which is clearly demonstrated by their statement: "[W]e *feel compelled* to remand for resentencing at which the trial court is to not only consider the *Miller* factors, but to decide whether the individual is the truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform." *Id.* at ___; slip op at 28. Clearly, the majority's ruling on this matter was governed by their "feelings," not the law.

Moreover, the majority incorrectly contends that without findings of "irreparable corruption" and "no possibility of rehabilitation" the sentencing court should not have sentenced him to life imprisonment without parole. Again, the appellate court has created law and not followed it. In no cases nor statutes are these findings necessitated before imposing a life-

imprisonment-without-parole sentence. They are standards by which to judge a defendant when imposing a proportional sentence. It is true that the sentencing court made findings regarding defendant not being "irretrievably corrupt" and the "possibility of [defendant's] rehabilitation[,]" but these findings of fact did not ultimately require the trial court to sentence defendant to a lesser sentence than life imprisonment without parole as the sentencing court could consider *all* of the factors and determine the appropriate sentence. Defendant has not demonstrated an abuse of discretion in how the trial court chose to weigh any factors as compared to each other nor in how the sentencing court weighed "all the circumstances of the offenses" in light of them. Yet, the majority simply disagrees with the sentencing judge and, hence, has erroneously remanded for resentencing.

The majority claims to rely on *Milbourn* as a guiding light for its analysis, *Hyatt*, ___ Mich App at ___; slip op at 25, but it disregards *Milbourn*'s primary notion, "*The trial court* appropriately exercises *the discretion left to it* by the Legislature not by applying its own philosophy of sentencing, but by determining where, on the continuum from the least to the most serious situations, an individual case falls and by sentencing the offender in accordance with this determination." *Milbourn*, 435 Mich at 651 (emphasis added). The sentencing judge in this case complied with *Milbourn*, analyzing all of the evidence before it, and imposed a proportionate sentence, just as the dissenting judges properly recognized. *Hyatt*, ___ Mich App at ___; slip op at 1 (METER, J., concurring in part and dissenting in part) ("The sentencing court explicitly mentioned and adhered to the principle of proportionality. In addition, the sentencing court, as noted by the panel in *People v Perkins*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket Nos. 323454; 323876; 325741); slip op at 22, explicitly took the *Miller* factors into consideration.)

The majority now seeks to substitute its own judgment for that of the sentencing judge, which *Milbourn* does not condone.

As the sentencing court sits in the unique position to consider the evidence presented before it, including the credibility of Defendant during his police interview and his testimony at the *Miller* hearing, an appellate court must defer to the sentencing court's credibility determinations. See *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Furthermore, the sentencing court followed the mandate of MCL 769.25 by considering the *Miller* factors and other relevant criteria, stating the aggravating and mitigating circumstances on the record, and imposing a statutorily authorized sentence of life imprisonment without parole. The sentencing judge here thoughtfully weighed the applicable factors, particularly Defendant's youth and its attendant circumstances, and implicitly concluded defendant was unfit ever to reenter society. As required by *Miller*, the sentencing judge here considered all relevant evidence bearing on the distinctive attributes of youth and how those attributes diminish the penological justifications for imposing the harshest sentences on juvenile offenders. The *Hyatt* majority clearly erred in concluding otherwise. The *Miller* Court *believed* the "harshest penalty will be uncommon [,]" 567 US at ___; 132 S Ct 2481, and this case is "uncommon." In fact, a juvenile who chooses to kill will always be "uncommon."

iv. Conclusion

For the foregoing reasons and based on the testimony elicited at the *Miller* hearing, the sentencing court imposed a reasonable sentence that was proportional to Defendant Hyatt's actions, circumstances of the case, background, age, and personal characteristics, which *reflected* his irreparable corruption. MCL 769.25; *Miller*, 567 US ___; 132 S Ct 2455 (2012). It is not an appellate court's role to second-guess the sentencing judge. Thus, appellate courts are not called

upon to say whether, if the decision were up to them in the first instance, whether they would or would not conclude that a defendant is "irreparably corrupt." Rather, an appellate court simply determines if an abuse of discretion occurred, and here, there is no such finding, nor is there a basis for such a finding. The *Hyatt* majority *never* found that the sentencing judge abused her discretion when imposing a life-imprisonment-without-parole sentence. Accordingly, the sentencing judge did not abuse her discretion and Defendant Hyatt's sentence should be affirmed.

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 doing so:

1. Reverse the *Hyatt* majority's erroneous interpretation of and reliance on the obiter dicta of *Miller* and *Montgomery* requiring a sentencing court to find that a juvenile murderer to be "truly rare" before imposing a life-imprisonment-without-parole sentence;
2. Reverse the *Hyatt* majority's erroneous "heightened" abuse-of-discretion standard of review, and instead adopt and apply the common abuse-of-discretion standard of review on appellate review to sentences under MCL 769.25;
3. Reverse the *Hyatt* majority's order remanding this case to the sentencing court for further consideration; and
4. Affirm the sentencing judge's imposed sentence of life imprisonment without parole.

Respectfully Submitted,

DAVID S. LEYTON
PROSECUTING ATTORNEY
GENESEE COUNTY

/s/ Joseph F. Sawka
Joseph F. Sawka (P74197)
Assistant Prosecuting Attorney
Genesee County Prosecutor's Office
900 S. Saginaw Street
Flint, MI 48502
(810) 257-3210

DATED: August 30, 2016

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

APPENDIX

1. *People v Hyatt*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 325741).

2. *People v Perkins*, unpublished order of the Court of Appeals, issued February 12, 2016 (Docket Nos. 323454, 323876, 325741).

3. *People v Hyatt*, unpublished order of the Court of Appeals, issued February 19, 2016 (Docket No. 325741)