STATE OF MICHIGAN

IN THE

SUPREME COURT

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

KENYA ALI HYATT,

Defendant-Appellee.
/

Supreme Court
No. 153081

Court of Appeals
No. 325741

Circuit Court
No. 13-032654-FC

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PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF OUR APPLICATION FOR LEAVE TO APPEAL

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SUPPLEMENTAL STATEMENT OF QUESTION PRESENTED

I. Whether the four-judge majority of the conflict-resolution panel of the Court of Appeals reversibly erred when it created and applied a heightened standard of review for sentences imposed under MCL 769.25, where the majority's heightened standard of review is fatally premised on an erroneous interpretation of *Miller v Alabama* and an unfounded assumption that trial courts and appellate courts cannot follow the law, and where the heightened standard of review is patently contradictory?

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

SUPPLEMENTAL STATEMENT OF FACTS

The People incorporate by reference the Statement of Facts as well as the abbreviations and citations to the record contained in our, Plaintiff-Appellant's, Amended Application for Leave to Appeal, pp 1–13.

Additional pertinent facts and procedural history will be discussed in the body of the People, Plaintiff-Appellant's, Supplemental Brief, *infra*, to the extent necessary to advise this Court fully as to the arguments raised on appeal.

SUPPLEMENTAL ARGUMENT

I. The four-judge majority of the conflict-resolution panel of the Court of Appeals reversibly erred when it created and applied a heightened standard of review for sentences imposed under MCL 769.25, where the standard of review is fatally premised on an erroneous interpretation of *Miller v Alabama* and an unfounded assumption that trial courts and appellate courts cannot follow the law, and where the heightened standard of review is patently contradictory.

This Court requested a supplemental brief "addressing whether the conflict-resolution panel of the Court of Appeals erred by applying a heightened standard of review for sentences imposed under MCL 769.25." *People v Hyatt*, ___ Mich ___; ___ NW2d ___ (2017) (Docket Nos. 153081, 153345). The short answer to this Court's question is, "Yes," because the four-judge majority's creation and implementation of "a heightened degree of scrutiny" is fatally premised on an erroneous reading of *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012) and *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), as well as an unsupported assumption that circuit courts and appellate courts will "rubber-stamp" life-without-parole sentences, and the heightened standard of review is patently contradictory. See *People v Hyatt*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 325741). Consequently, the appellate court reversibly erred when it vacated Defendant's lawfully imposed sentence of life without parole based on the erroneous heightened standard of review.

a. The standard of appellate review is critical to a properly functioning criminal justice system, and the majority's heightened standard of review impermissibly shifts the balance of power between the trial and appellate courts.

The importance of the standard of review cannot be understated.

> Standards of review balance the power among the courts, enhance judicial economy, standardize the appellate process, and give the parties in a lawsuit an idea of their chance of success on appeal. All of these policies are interconnected. And, when appellate court judges use standards of review faithfully and consistently, these principles are upheld. [Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 Lewis & Clark L Rev 233, 238 (2009).]

The standard of review is to the appellate opinion what the burden of proof is to a jury; the measure for a decision. Hence, the foundation for any sound appellate decision is the application of the appropriate standard of review.

In the context of modern-day criminal sentencing, it is generally well-recognized that a "common three-fold" standard of review applies to most sentences on appeal: questions of law are reviewed "de novo," questions of fact are reviewed for "clear error," and matters of discretion are reviewed for an "abuse of discretion."[1] See, e.g., *Gall v United States*, 552 US 38, 51; 128 S Ct 586; 169 L Ed 2d 445 (2007) (explaining the standard of review of federal sentences in the context of the federal sentencing guidelines); *People v Hardy*, 494 Mich 430, 437–38; 835 NW2d 340 (2013) (explaining the standard of review of sentences in the context of Michigan's sentencing guidelines). The driving theory behind this three-fold standard of review is the recognition that deference should—*if not must*—be afforded to the trial court's findings of fact and ultimate decision on an imposed sentence. See *Gall*, 552 US at 51–52 ("The sentencing judge is in a superior position to find facts and judge their import under [18 USC] 3553(a) in the individual case."; "District courts have an institutional advantage over appellate courts in making these sorts of determinations[.]") (Citations omitted); *People v Babcock*, 469 Mich 247, 270; 666 NW2d 231 (2003) ("The deference that is due is an acknowledgment of the trial court's

[1] There, of course, exists a small number of sentences that are outliers to the application of the common three-fold standard of review. Particularly, the jurisprudence involving capital punishment, i.e., the death penalty, is its own world and is not easily susceptible to such review because of *the jury's role* in the sentencing phase and constitutional considerations involved. See *Caldwell v Mississippi*, 472 US 320, 328–29; 105 S Ct 2633; 86 L Ed 2d 231 (1985) ("This Court has repeatedly said that under the Eighth Amendment *the qualitative difference of death from all other punishments* requires a correspondingly greater degree of scrutiny of the capital sentencing determination.") (Internal quotation marks and citation omitted; emphasis added). In addition, cases where mandatory sentences are imposed, i.e., "felony-firearm," MCL 750.227b, do not implicate a trial court's discretion.

extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender.").

The primary reason this three-fold standard of review works so well in the sentencing context—and why it should not be tampered with—is because each standard places emphasis on a different component of the sentencing process, which in turn produces a result that invites confidence in the court system, from both the public and the court system itself. The "clear error" standard looks to the evidence in the record, irrespective of personal opinion, in support of a trial court's factual findings. The "de novo" standard looks at the law, informing the appellate court that it can "double check" the appropriate interpretation and application of the law. Finally, the "abuse of discretion" standard looks to the trial court's ultimate decision based on its findings of fact and interpretation of law, paying proper deference to the unique position in which the trial court sits, recognizing that a sentence is an exercise in discretion based on a unique set of factors in any given case, which encourages the trial court to utilize all available and legally permissible information to fashion the correct sentence. This three-fold standard assures the trial court that the appellate court will not reverse a sentencing decision based on mere disagreement because the appellate court is restrained by the deference that must be afforded to the trial court, but the appellate court remains powerful because it can correct mistakes made by the trial court with respect to its factual findings, mistakes of law, and the ultimate sentencing decision, but through a deferential prism, thus balancing the powers between the courts.

Where a new sentencing scheme is introduced by a legislature, it will consequently fall on to the courts of the respective jurisdiction to exercise their legal prowess to interpret, develop, and scrutinize the correct standard of appellate review for sentences stemming from the new scheme. See, e.g., *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015); *Babcock*, 469

Mich 247; *People v Hegwood*, 465 Mich 432, 437–39; 636 NW2d 127 (2001); *People v Fields*, 448 Mich 528; NW2d 176 (1995); *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Our Legislature's recent enactment of MCL 769.25 in response to *Miller v Alabama*, 567 US ___; 132 S Ct 2455 is no exception.

Once a juvenile is convicted of a listed homicide offense, the statute allows the prosecuting attorney to "file a motion under this section to sentence" the juvenile murderer "to imprisonment for life without the possibility of parole[.]" MCL 769.25(2). MCL 769.25 then explains the sentencing process:

> (6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in *Miller v Alabama*, 5[67] US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.
>
> (7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.
>
> * * *
>
> (9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.

Nowhere within MCL 769.25 did the Legislature specify the standard of review to be applied on appeal when reviewing either a life-without-parole[2] or a term-of-years sentence. Thus, it falls on the appellate court to define the standard of review. The unanimous *Hyatt* court correctly applied

[2] Hereinafter within this Supplemental Brief, the People will refer to "life without parole" as "LWOP" and will also refer to "juvenile life without parole" in this context as "JLWOP."

the common three-fold standard discussed *supra*,[3] but critically and reversibly erred when it added an unfounded additional level of review to JLWOP sentences, finding them "inherently suspect," because the ruling was based on an erroneous interpretation of *Miller*, supplemented by *Montgomery*, and an unprincipled assumption about the aptitude of trial court and appellate court judges. Accordingly, the People assert that this Court should reverse the *Hyatt* majority's "heightened standard of review" and adopt the common-threefold standard as the appropriate standard of appellate review of JLWOP sentences, which, consequently, necessitates this Court to reverse the appellate court's decision to vacate Defendant's sentence, and reinstate his LWOP sentence imposed by the trial court.

b. The United States Supreme Court's "gratuitous prediction" in Miller v Alabama, *that life without parole sentences for juvenile murderers will be "uncommon," and later supplemented by* Montgomery v Louisiana, *is obiter dictum, not a rule of law, as recognized by multiple jurisdictions, and must not operate to constrain the imposition of a proper sentence on a juvenile murderer.*

In *Hyatt*, the four-judge majority held:

> Because of the unique nature of the punishment of a life-without-parole sentence for juveniles and the mitigating qualities of youth . . . 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. [*Hyatt*, ___ Mich App at ___; slip op at 25–26.]

The majority founded its holding on one particular aspect and interpretation of the *Miller* opinion, without which the entire reasoning behind the holding crumbles. The *Hyatt* majority interpreted the *Miller* Court's statement, "[G]iven all we have said . . . we *think* appropriate

[3] The three concurring and dissenting judges, METER, M.J. KELLY, AND RIORDAN, JJ., apparently agreed with the application of the common three-fold standard of review, but disagreed with the heightened standard of scrutiny applied by the four-judge majority, although they based their disagreement on the majority's application of *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *Hyatt*, ___ Mich App at ___; slip op at 1–2 (METER, J., dissenting).

occasions for sentencing juveniles to this harshest possible penalty will be uncommon[,]" 567 US at ___; 132 S Ct at 2469 (emphasis added), as a rule of law, rather than the obiter dictum for which it is. Because the *Hyatt* majority believed that *Miller* dictated LWOP sentences for juveniles be "infrequent[]" and reserved for "the truly rare juvenile," *Hyatt*, ___ Mich App at ___; slip op at 25, 26, the majority created a "heightened" standard of review for LWOP sentences that is not in accord with *Miller*, but is, instead, an overbroad and invalid expanse of *Miller* at the expense of judicial restraint and the balance of judicial power.

i. The United States Supreme Court's use of the word "think" within *Miller* has a separate and distinct meaning from the word "hold" in the legal context; consequently, *Miller*'s statement constitutes obiter dictum.

As we have explained in our Amended Application for Leave to Appeal, pp 14–18, the holding in *Miller*, 567 US at ___; 132 S Ct at 2469, is a direct one: "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life imprisonment without possibility of parole for juvenile offenders." The *Miller* Court's *belief* about how many juvenile murderers will be sentenced to LWOP is not a holding, *it is obiter dictum*, and as Chief Justice ROBERTS aptly characterized it, "*a gratuitous prediction*" and "nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges." *Id.* at ___; 132 S Ct at 2481 (ROBERTS, C.J., dissenting) (emphasis added). Chief Justice ROBERTS is correct. Furthermore, the *Montgomery* Court wrenched this obiter dictum from *Miller* into a quasi-substantive/quasi-procedural basis to apply *Miller* retroactively and, in doing so, expanded *Miller*'s belief that JLWOP sentences will be "uncommon" into the belief that "the sentence of life without parole is disproportionate for the *vast majority* of juvenile offenders." 577 US at ___; 136 S Ct at 734, 736 (emphasis added). Treating these obiter dicta as precedential rules of

law is erroneous and dangerous because it sets the tone for the judicial system to substitute its policy judgments for that of the legislative branch.

Notably, in her majority opinion, Justice KAGAN did not "hold" that JLWOP sentences "should be" or "must be" "rare" or "uncommon." Instead, Justice KAGAN used the word "think." *Miller*, 567 US at ___; 132 S Ct at 2469 (opinion of the Court). "Think" (as an intransitive verb) is defined as "to exercise the powers of judgment, conception, or inference"; "to have in the mind or call to mind a thought"; "to have the mind engaged in reflection"; "to have a view or opinion." *Merriam-Webster's Collegiate Dictionary* (11th ed). The *Merriam-Webster's Collegiate Thesaurus* (2nd ed) provides the following common synonyms for "think" (as an intransitive verb): allow, believe, conceive, consider, deem, esteem, feel, figure, guess, imagine, judge, and suppose. While *Merriam-Webster's Collegiate Thesaurus* (2nd ed) also lists "hold" as a synonym, this synonym is not applicable in this context because of the difference in lay terminology and legal terminology. As Justice ZAHRA properly explained in *People v Rapp*, 492 Mich 67, 91 n 19; 821 NW2d 452 (2012) (ZAHRA, J., dissenting), "A particular term may be more or less appropriate than another term *given the particular context* in which the term is being used. A thesaurus does not supply a list of synonymous terms that *should be* used interchangeably as if they have identical meanings." (Emphasis added.) Particularly, in the context of legal terminology, "hold" (as an intransitive verb) has a distinct meaning, "2. (Of a court) to adjudge or decide as a matter of law (as opposed to fact) <this court thus holds the statute to be unconstitutional>." *Black's Law Dictionary* (10th ed). When courts issue a "ruling" and when jurists speak of a court's "ruling," they speak of the "holding" of the case, not the "thinking" of the case.

From the definition of "think" and its synonyms, it becomes apparent that when a person, particularly a judge or justice, "thinks" something, such a thought is not *necessarily* a holding. The context of the word's usage will influence the meaning. To "think," as Justice KAGAN has used the word in *Miller*, evidences an "exercise" of her and the majority's "powers of judgment" after "engag[ing] in reflection" of precedent, and they "assume, expect, or feel" that JLWOP will be "uncommon," which is not a declaration of a rule of law. It would be incredulous to believe that Justice KAGAN was haphazard with her wording. Surely, if Justice KAGAN intended, as a rule of law, to make LWOP sentences "uncommon" for juvenile murderers, then such a *holding* would have been explicitly stated, not hidden in ambivalent language.

ii. Other jurisdictions have correctly interpreted the *Miller* Court's use of the word "think" with respect to the "uncommon" nature of juvenile life-without-parole sentences as obiter dictum, in which this Court should join.

The People's position is buttressed by other jurisdictions that have considered whether *Miller*'s "gratuitous prediction" is a rule of law or obiter dictum. Three jurisdictions have explicitly concluded, either in a majority opinion or a concurring opinion, that *Miller*'s "uncommon" language is obiter dictum.[4]

1. California courts deem Miller's language a "prognostication" and a "belief," not a precedential rule of law.

The earliest appellate decision the People have found addressing this issue comes from the Supreme Court of California. In *People v Gutierrez*, 58 Cal 4th 1354, 1387; 171 Cal Rptr 3d

[4] The People recognize that in *State v Seats*, 865 NW2d 545, 589 (Iowa 2015) (MANSFIELD, J., dissenting), superseded by *State v Sweet*, 879 NW2d 811 (Iowa 2016), three dissenting justices of the Iowa Supreme Court erroneously believed that a *de novo* standard of review was appropriate to determine whether "the case is sufficiently uncommon" to impose a LWOP sentence on a juvenile murderer. Nevertheless, the issue is now moot in Iowa because the Iowa Supreme Court has declared JLWOP unconstitutional under the Iowa Constitution. *Sweet*, 879 NW2d 811. The Georgia Supreme Court also erroneously presumed that the "gratuitous" language was tantamount to a rule of law affecting a trial court's sentencing discretion, but failed to explain how. *Veal v State*, 298 Ga 691, 700–02; 784 SE2d 403 (2016).

421; 324 P3d 245 (2014), the California Supreme Court held that section 190.5(b) of the California Penal Code gives a sentencing court the discretion to impose a sentence of either LWOP or a term of 25 years to life on a 16– or 17-year-old juvenile convicted of special-circumstance murder, with no presumption in favor of LWOP. While the issue presented before the *Gutierrez* Court was limited, Justice CORRIGAN, joined by the Chief Justice and two Associate Justices,[5] filed a concurring opinion, "stress[ing] that California's individualized, discretionary sentencing scheme is very different from the mandatory life without parole sentence the United States Supreme Court addressed in *Miller* [ ]." *Id.* at 1392 (CORRIGAN, J., concurring). In her concurrence, Justice CORRIGAN wrote, "Whether " 'appropriate occasions' " for sentencing juveniles to life without parole will be uncommon is not a *prognostication* that should be made globally and in the abstract." *Id.* at 1393 (emphasis added), citing *id.* at 1378 (opinion of the Court), quoting *Miller*, 567 US at ___; 132 S Ct at 2469. Justice CORRIGAN concluded that "[t]he appropriate sentence for any *particular* minor remains a question for the sentencing court. . . . The majority opinion here should not be read to suggest otherwise." *Gutierrez*, 58 Cal 4th at 1393–94 (CORRIGAN, J., concurring) (emphasis in original). Necessarily, the California Supreme Court has ruled that *Miller*'s belief that a LWOP sentence will be "uncommon" for juvenile murderers is obiter dictum, not a precedential rule of law.

Following the ruling in *Gutierrez*, the California District Courts of Appeal characterized *Miller*'s use of the words "uncommon" and "rare" similar to the California Supreme Court's characterization in *Gutierrez*. In *People v Palafox*, 231 Cal App 4th 68, 91; 179 Cal Rptr 3d 789

[5] The People note that California's Supreme Court is comprised of seven justices in total. California Constitution, art VI, § 2, "The Supreme Court consists of the Chief Justice of California and 6 associate justices." "Concurrence of 4 judges present at the argument is necessary for a judgment." *Id.* Accordingly, the concurrence in *Gutierrez*, which consisted of four justices, is a majority ruling and, thus, a judgment to be given full precedential value in California.

(2015), the appellate court characterized *Miller*'s aforementioned language as a "belief," stating, "That the [United States Supreme] [C]ourt expressed *belief* appropriate occasions for sentencing juveniles to LWOP would be rare" does not change that fact that "*Miller* did not say the possibility of rehabilitation overrides all other relevant factors." (Emphasis added). "Belief" (as a noun) is defined as "2: something that is accepted, considered to be true, or held as an opinion: something believed; 3: conviction of the truth of some statement or the reality of some being or phenomenon especially when based on examination of evidence." *Merriam-Webster's Collegiate Dictionary* (11th ed). Hence, "*Miller* made clear that *a sentencer* has the ability to make such *a judgment* in homicide cases." *Palafox*, 231 Cal App 4th at 91 (emphasis added).

2. Utah courts deem <u>Miller</u>'s language a "hope," not a precedential rule of law.

In *State v Houston*, 353 P3d 55, 77; 781 Utah Adv Rep 33; 782 Utah Adv Rep 4; 2015 UT 40 (Utah, 2015), cert den ___ US ___; 136 S Ct 2005; 195 L Ed 2d 221 (2016), the 17-and-a-half-year-old defendant pleaded guilty to aggravated murder, and pursuant to Utah's sentencing statue, eleven of twelve jurors voted to sentence him to LWOP, rather than a term of years. The Utah Supreme Court affirmed his sentence, and during its proportionality analysis, the Court characterized the "uncommon" and "rare" language of *Miller* not as a rule of law to be followed, but as "*hope* expressed by the Supreme Court that LWOP sentences for juveniles will be rare." *Id.* at 77 (citation omitted; emphasis added).

Going one step further, Justice LEE, concurring in part and concurring in the judgment, disapproved of the majority's emphasis of *Miller*'s language as a "hope," stating,

> I would also stop short of expressing any "hope . . . that LWOP sentences for juveniles will be rare." [ ] That sounds well and good as a matter of humanitarian empathy. But it strikes me *as beyond our role as judges* to express "hope" for any particular outcome—as to jury verdicts, damages awards, or criminal sentences—in the

> proceedings that we review on appeal. [*Id.* at 92 n 189 (LEE, J., concurring in part and concurring in the judgment) (internal citation omitted; emphasis added).]

3. Arizona courts deem Miller's language a "suggestion" and a "sweeping pronouncement," not a precedential rule of law.

Very recently, on December 23, 2016, the Supreme Court of Arizona, in *State v Valencia*, 386 P3d 392, 395 (Ariz 2016), took the position that the *Miller* Court's statement, that JLWOP sentences should be "uncommon," is not a rule of law, rather it is a "suggestion." The majority stated, "The [*Miller*] Court further *noted* that 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon,' *suggesting* that such sentences can only be imposed on the 'rare juvenile offender whose crime reflects irreparable corruption' as distinct from 'transient immaturity.' " *Id.* at 395 (internal citations omitted; emphasis added). Markedly, when citing the language in *Miller*, the *Valencia* Court used the verb "noted," which means: "1 a: to notice or observe with care; 2 a: to make special mention of or remark on." *Merriam-Webster's Collegiate Dictionary* (11th ed). The Court also used the verb "suggest," which means: "1 a: to seek to influence; b: to call forth; c: to mention or imply as a possibility; d: to propose as desirable or fitting; e: to offer for consideration or as a hypothesis." *Merriam-Webster's Collegiate Dictionary* (11th ed). Accordingly, "noted" and "suggest" do not equate with "hold" within the legal context by their distinct definitions. The *Valencia* Court properly recognized *Miller*'s pronouncement was dictum, not a precedential rule of law.

In a robust concurrence, Justice BOLICK, with whom Vice Chief Justice PELANDER joined, "agree[d] with the concerns expressed by the *Miller* and *Montgomery* dissenters." *Valencia*, 386 P3d at 397 (BOLICK, J., concurring).

> [T]he *Montgomery* Court's suggestion that states can avoid re-litigating old sentences "by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them,"

> [577 US at ___;] 136 S Ct at 736, amounts to none-too-subtle coercion. See *id.* [at ___; 136 S Ct] at 744 (SCALIA, J., dissenting) [].
>
> But even more troubling from a practical standpoint is the Court's *sweeping pronouncement* that the "vast majority" of juvenile offenders must be shielded from lifetime confinement. *Id.* [at ___; 136 S Ct] at 734 [(opinion of the Court)]. By announcing in advance that most murders committed by juveniles "reflect the transient immaturity of youth," the Court trivializes the killers' actions and culpability. "Transient immaturity" is when my adolescent daughter slugs her big brother. It may even describe peer pressures that influence reckless behavior. But it is not an apt rationalization for cold-blooded murder.
>
> In *Miller*, the Court remarked that "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." [567 US at ___;] 132 S Ct at 2469. This "gratuitous prediction," Chief Justice ROBERTS responded, "appears to be . . . an invitation to overturn life without parole sentences," without explicitly "declaring that the Eighth Amendment prohibits them." [567 US at ___; 132 S Ct] at 2481 (ROBERTS, C.J., dissenting). By *Montgomery*, "uncommon" evolved into "vast majority," with the Court attributing to *Miller* a "conclusion" it never reached: "that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders." *Montgomery*, [577 US at ___;] 136 S Ct at 736 [(opinion of the Court)].
>
> We should treat the Court's *forecast* that irreparable corruption will not be found in the "vast majority" of cases as *speculative and dictum*. [*Valencia*, 386 P3d at 397–98 (BOLICK, J., concurring) (first parenthetical omitted; emphasis added).]

Justice BOLICK's concurrence concluded with a salient and impenetrable point, of which this Court should take note:

> Our system's integrity and constitutionality depend *not* on whether the overall number of sentences of life without parole meted out to youthful murderers are many or few. They depend primarily on whether justice is rendered in individual cases. Cf. *McClesky v Kemp*, 481 US 279, 294–95; 107 S Ct 1756; 95 L Ed 2d 262 (1987) (rejecting statistics-based challenge to the death penalty). [*Valencia*, 386 P3d at 397–98 (BOLICK, J., concurring) (emphasis added).]

From the initial issuance of the opinion in *Miller v Alabama*, 567 US ___; 132 S Ct 2455, to the resulting reverberations of the opinion in *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718, jurisdictions have appropriately characterized the Court's expressions of what it "thinks" are the "appropriate occasions" for JLWOP sentences as dicta, not precedential rules of law. Furthermore, at least one justice of each of the respective supreme courts' majorities has issued a detailed concurring analysis of the "gratuitous prediction" stated in *Miller*, and expanded on by *Montgomery*, and each has rejected the notion that lower courts must adhere to those pronouncements in *Miller* and *Montgomery* as legal precedent. Each respective court majority and justice has properly recognized the *Miller* Court's statement, "[G]iven all we have said . . . we *think* appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon[,]" 567 US at ___; 132 S Ct at 2469 (emphasis added), *is dictum*, not a precedential rule of law.

Accordingly, this Court should follow the growing number of jurisdictions that correctly recognize the foregoing statement in *Miller*, and expanded on by *Montgomery*, as obiter dictum. Adopting this position will, as Justice BOLICK commented, promote the integrity and constitutionality of our criminal justice system, where no sentence should be dependent on whether that sentence is "meted out to . . . [the] many or few." *Valencia*, 386 P3d at 398 (BOLICK, J., concurring). To hold otherwise would end the concept of justice as we know it, as an instinct, innate, moral sense; instead, converting it to a mathematical balancing test without regard to *the individual* as *Miller* dictates. As the first Chief Justice of the United States Supreme Court, JOHN JAY, aptly put it, "Justice is indiscriminately due all, without regard to numbers, wealth, or rank." *Georgia v Brailsford*, 3 US 1, 4; 3 Dall 1; 1 L Ed 483 (1794).

iii. In *Holbrook v Flynn*, the United States Supreme Court employed language equivalent to that in *Miller* and recognized that the Court's expressed "preference" was not a precedential rule of law.

This is not the first time that the United States Supreme Court has employed prognostic language within an opinion. In *Holbrook v Flynn*, 475 US 560, 569; 106 S Ct 1340; 89 L Ed 2d 525 (1986), the Court held "the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial" was not presumptively inherently prejudicial, like shackling, that should be permitted only where justified by an essential state interest specific to each trial. A case-by-case analysis is necessary to determine if the challenged practice is inherently prejudicial or actually prejudicial. *Id.* at 572. In so ruling, Justice MARSHALL, writing for a unanimous Court, stated, "While, in our supervisory capacity, *we might express a preference* that officers providing courtroom security in federal courts not be easily identifiable by jurors as guards,[] we are much more constrained when reviewing a constitutional challenge to a state-court proceeding." *Id.* (footnote and citations omitted; emphasis added).

Taking note of the Court's language, Chief Justice BURGER wrote a concurrence *solely directed* at the Court's expressed "preference." He observantly stated,

> I write only to explain my reading of the Court's statement that "in our supervisory capacity, we *might* express a preference that officers providing courtroom security in federal courts not be easily identifiable by jurors as guards . . . ." [475 US at 572] (emphasis added). In joining the opinion, I interpret the Court's carefully qualified statement in this case—a state case—as containing no suggestion that federal officers providing security must doff their uniforms before entering federal courtrooms, and certainly none of the three cases the Court cites, [*id.* at 572 n 5], would require any such arbitrary action. Moreover, the issue of what kind of security arrangements some might "prefer" is, of course, quite distinct from issues such as whether a federal defendant would become entitled to a new trial because of an alleged prejudicial effect of the security measures used at his trial. On this understanding, I join the Court's opinion. [*Id.* at 572–73 (BURGER, C.J., concurring) (emphasis in original).]

Chief Justice BURGER accurately recognized that the Court's expressed "preference" for certain procedures did not amount to a rule of law, rather it was dictum.

Likewise, the *Miller* Court's expressed preference for LWOP sentences for juveniles to be "uncommon" is also not a rule of law, but dictum. Comparing the language used in *Holbrook* and *Miller* solidifies this conclusion. The *Holbrook* Court used the language, "While, in our supervisory capacity, *we might express a preference* . . . ." 475 US at 572 (emphasis added). To "express" (as a verb) means "1 b: to represent in words; c: to give or convey a true impression of; d: to make known the opinions or feelings of (oneself)." *Merriam-Webster's Collegiate Dictionary* (11th ed). The *Miller* Court used the language, "[G]iven all we have said . . . *we think* . . . ." 567 US at ___; 132 S Ct at 2469 (emphasis added). Each emphasized phrase connotes a similar meaning, but neither connotation is equivalent to a "holding" within the respective cases. Accordingly, the United States Supreme Court's use of similar language in *Holbrook* is instructive here, and *Miller*'s language should likewise be construed as obiter dictum.

iv. The Michigan Supreme Court used the language "we think" and the term "rare" within recent opinions, and at no point has such language constituted a precedential rule of law.

Finally, this Court has used the phrase "we think" and the term "rare" within its opinions in similar contexts as the People assert it is used in *Miller*, that is, as obiter dictum. First, this Court used the language "we think" within a recent opinion, demonstrating the point that what this Court "thinks" and what it "holds" are two different things. In *In re Morris*, 491 Mich 81, 88; 815 NW2d 62 (2012), this Court stated,

> While it is impossible to articulate a precise rule that will encompass every possible factual situation, in light of the interests protected by ICWA [Indian Child Welfare Act, 25 USC 1901 through 25 USC 1963], the potentially high costs of erroneously concluding that notice need not be sent, and the relatively low

> burden of erring in favor of requiring notice, *we think* the standard for triggering the notice requirement of 25 USC 1912(a) must be a cautionary one. Therefore, *we hold* first that sufficiently reliable information of virtually any criteria on which tribal membership might be based suffices to trigger the notice requirement. *We hold* also that a parent of an Indian child cannot waive the separate and independent ICWA rights of an Indian child's tribe and that the trial court must maintain a documentary record . . . . Finally, *we hold* that the proper remedy for an ICWA-notice violation is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue. [Ellipses added; footnote omitted; emphasis added.]

This Court went on to use the phrase, "we think," four additional times in its opinion. *In re Morris*, 491 Mich at 105 ("*We think* the 'reason to know' standard for purposes of the notice requirement in 25 USC 1912(a) should set a rather low bar.") (Emphasis added); 106 ("Third, *we think* the burden on the trial court and the DHS [Department of Human Services] of complying with the notice requirement is minimal when compared to the potential costs of erroneously failing to send notice.") (Emphasis added); 121 ("First, *we think* the use of a conditional reversal is more consistent with the text of 25 USC 1912(a), ... In sum, *we think* that the conditional-reversal remedy is more emphatic, more consistent with the text and purposes animating ICWA, and more likely to encourage compliance with ICWA.") (Emphasis added). Each time the court used the language, "we think," it *did not* issue a holding. Rather, this Court spoke of its observations of facts, law, and its beliefs, which explained its holding. In no instance did this Court in *In Re Morris* phrase its *holding* as, "we think." Likewise, the *Miller* majority's "thought" that LWOP sentences for juvenile murderers will be uncommon is not a holding; it is dictum.

Second, this Court has used the term "rare" within a recent opinion, demonstrating that when this Court expresses a belief that something might be "rare" in the legal realm such an expression is not equivalent to a rule of law. In *People v Grissom*, 492 Mich 296, 321; 821

NW2d 50 (2012), this Court held "that newly discovered impeachment evidence generally is insufficient to warrant a new trial" unless it "satisfie[d] the four-part test set forth in" *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003). As part of its rationale, this Court cited and adopted federal jurisprudence, *Grissom*, 492 Mich at 313–15, namely, *United States v Taglia*, 922 F2d 413, 415 (CA 7, 1991), which opined, "Of course it will be *the rare case* in which impeaching evidence warrants a new trial, because ordinarily such evidence will cast doubt at most on the testimony of only one of the witnesses." (Emphasis added). Adopting the belief that such cases would be "rare," *Grissom*, 492 Mich at 318, this Court also recognized

> that merely because
>
> > "[t]he practice has been to deny new trials where the only newly discovered evidence was impeaching[,] . . . the practice should not be taken to imply *a rule* that even if the defendant proves that his conviction almost certainly rests on a lie, the [trial] judge is helpless to grant a new trial." [*Id.* at 314–15 (emphasis in original), quoting *Taglia*, 922 F2d at 415.]

This Court further stated, "[W]hen that *rare* case presents itself, a court *should not* refuse to grant a new trial solely on the ground that the newly discovered evidence is impeachment evidence." *Grissom*, 492 Mich at 318 (emphasis added). Justice ZAHRA, with whom Chief Justice YOUNG and Justice MARY BETH KELLY joined, concurring in part and dissenting in part, further explained, "I agree with the majority that our case law *has not characterized this principle as a strict, per se rule* prohibiting the grant of a new trial because of newly discovered impeachment evidence, even though some Court of Appeals panels have apparently treated it as such." *Id.* at 346 (ZAHRA, J., concurring in part and dissenting in part) (citations omitted).

It follows from this Court's own use and explanation of the term "rare" within *Grissom* that simply because a court believes, suggests, hopes, feels, or *thinks* that a particular occurrence: such as a case, sentence, or holding, should be or will be "rare" or "uncommon" does not make

such forecasts a rule of law. The same logic applies to the analysis of *Miller*'s belief that LWOP sentences for juvenile murderers will be "uncommon" or "rare," or *Montgomery*'s belief that such sentences will be inapplicable to the "vast majority" of juvenile murderers. *Miller* and *Montgomery*'s predictions do not constitute rules of law, and this Court should not treat them as such. To hold otherwise would allow courts of any jurisdiction to usurp the role of the legislature by forecasting what the law will be, which, in essence, makes the legislature's role obsolete because the judicial branch will simply predict the law and implement policy for the future.

v. Conclusion: *Miller*'s "gratuitous prediction," that juvenile life-without-parole sentences will be "uncommon," is obiter dictum, which the *Hyatt* majority erroneously interpreted as a precedential rule of law, thus requiring reversal of the heightened standard of review.

Having established that *Miller* and *Montgomery*'s beliefs, that LWOP sentences for juvenile murderers should be "uncommon," "rare," or inapplicable for the "vast majority" of such defendants, is obiter dicta, the heightened standard of review established by the *Hyatt* majority, which was premised on the notion that these beliefs were tantamount to a rule of law, must be reversed because it is inconsistent with the legal jurisprudence of the United States Supreme Court, this Court, as well as sister courts. While the *Hyatt* majority claimed that "[i]t was not hollow exercise for the Supreme Court in *Miller* in *Montgomery* to repeatedly emphasize how truly rare a life-without-parole sentence will be proportionate[,]" ___ Mich App at ___; slip op at 25, it was also not an exercise in judicial authority to establish a rule of law, which is where the *Hyatt* majority reversibly erred. The court's heightened standard of appellate review impermissibly restricts the class of juvenile killers who will be subject to LWOP. Now, not only must their crime reflect irreparable corruption, but they must also be deemed "*truly* rare." The *Hyatt* majority has, thus, redefined the class of juvenile murderers deserving of LWOP and, in doing so, has rewritten *Miller* and MCL 769.25.

c. The majority misconstrued People v Milbourn *when it created a heightened standard of review based on the erroneous presumption that a life-without-parole sentence is unreasonable, and the erroneous presumption is compounded by the patently contradictory language of the heightened standard of review.*

The *Hyatt* majority held "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*." *Hyatt*, ___ Mich App at ___; slip op at 26 (emphasis added). Later, the majority stated, "While *we do not suggest a presumption against the constitutionality of such a sentence*, we would be remiss not to note that such sentences should require a searching inquiry into the record and the understanding *that, more likely than not, the sentence imposed is disproportionate*." *Id.* The majority relied on this Court's opinion in *People v Milbourn*, 435 Mich 630, in conjunction with *Miller* and *Montgomery* as discussed *supra*, to enact this new heightened standard of review. Yet, the heightened standard of review is not consistent with *Milbourn*, *Miller*, or *Montgomery*, and it is patently contradictory, thus requiring reversal.

i. When creating its heightened standard of review, the majority misconstrued the rationale of *Milbourn.*

In fashioning a newly-created heightened standard of review, the *Hyatt* majority relied on *Milbourn*'s "warning" "that the maximum penalty available under the law is to be imposed for only the most serious offenders and the most serious offenses or it would risk failing the proportionality test." *Hyatt*, ___ Mich App at ___; slip op at 26, citing, *Milbourn*, 435 Mich at 634–35. While *Milbourn*'s principle is well-accepted in our jurisprudence, the majority overlooked that in no sense did *Milbourn* anticipate, nor could it anticipate, that its reasoning might one day be extended to *the most heinous offense*, first-degree murder, or to *the most*

heinous offender, one who has been convicted of first-degree murder. In support of our conclusion, the People rely on the following recognition in *Milbourn*: "Turning from the legislative felony sentencing scheme in general to the prescribed punishment for individual felonies, we note that the Legislature has, *with only a few exceptions*, provided a range of punishment for each felony." 435 Mich at 651 (emphasis added). First-degree premeditated murder and first-degree felony murder were each an exception when *Milbourn* was issued because each crime carried a mandatory sentence of LWOP for adults *and* juveniles. See MCL 750.316, as amended by 1980 PA 28. Therefore, *Milbourn* cannot logically be said to have intended to include these crimes within its discussion. Rather, the language in *Milbourn* specifically excluded them. *Milbourn*, 435 Mich at 651.

Notably, in relying on *Milbourn*, the majority did not draw a distinction between a "range" of punishment and an "option" of punishment; the People see a difference that matters. When discussing a range of punishment, we think of sentences on a spectrum. For example, in *Milbourn*, the defendant was convicted of breaking and entering with intent to commit malicious destruction of property, MCL 750.110, which was (and still is) punishable by not more than 10 years' imprisonment. Accordingly, the "range" of punishment stems from 0 years to 10 years. To assist courts in determining a proportionate sentence, *Milbourn* pointed to the then-advisory sentencing guidelines as a rubric to guide courts. 435 Mich at 654–62. The guidelines, however, did not (and still do not) provide a binary sentencing option. Instead, the guidelines provided a spectrum of choices for courts to consider. Such guidelines do not exist in the context of MCL 769.25, which requires an initial binary sentencing choice. A binary sentencing scheme necessarily means that one of the options will be the harsher punishment. The *Hyatt* majority overlooked this distinction.

Under MCL 769.25, first-degree murder committed by a juvenile is punishable on the minimum-end by 25 years to 40 years with a maximum-end sentence of no less than 60 years, *or* by life imprisonment without parole. MCL 769.25(9). We assert that *Milbourn*'s rationale is not fully applicable to the sentencing scheme of MCL 769.25 because *Milbourn* did not address—*nor did it contemplate*, we believe—how its analysis would be applied to a binary sentencing scheme involving first-degree murder.[6] *Milbourn* did hypothesize, however, that "the [difficult] determination whether a sentence is so disproportionate to the seriousness of the circumstances of the crime as to require resentencing . . . may be compounded where the Legislature has set no minimum or has prescribed a maximum of a lengthy term of years or life." 435 Mich at 654. Yet, the Court never provided an alternative analysis or standard of review for such sentences. While MCL 769.25 might illustrate the difficult determination hypothesized in *Milbourn*, there is no basis to conclude that *Milbourn* mandates a heightened standard of review for such sentences. [7]

Nevertheless, the People agree that *Milbourn* is applicable, but not to the extent that the majority erroneously applied it. To harmonize *Milbourn* in the context of JLWOP sentences, the

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[6] Literature on "choice psychology" is non-existent within the criminal legal context, but it should not be given that judges make sentencing decisions. While one might not think about it, the Court's rationale in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990) delves into the psychology behind decision-making, that is, what sentence should be imposed based on *a range* of sentences. The choice in *Milbourn* was not the same choice under MCL 769.25, which deals with a *binary sentencing choice*. The psychology is different in each context, which is why we assert *Milbourn*'s rationale is not fully applicable to sentences under MCL 769.25. See, e.g., Chernev, Böckenholt & Goodman, *Choice overload: A conceptual review and meta-analysis*, 25, 2 J Consumer Psychol 333 (2015), available at <http://www.chernev.com/research/articles/ChoiceOverload_JCP_2015.pdf> (accessed, March 3, 2017) (discussing choice decision-making in the consumer context)

[7] The People recognize that if a trial court chooses the option of a term-of-years sentence, then it will necessarily have to set a range of sentence. The first choice, however, is what *option* is appropriate, not which *range* is appropriate. The present case only deals with an imposed LWOP sentence, but the People assert our position is also applicable to all sentences imposed under MCL 769.25 because no guidelines exist, unlike other sentences subject to Michigan's now-advisory sentencing guidelines.

answer is *not* to apply a heightened standard of review. Notably, *Milbourn did not* apply a heightened standard of review to vacate the defendant's sentence in that case, which was the maximum sentence allowed by law. 435 Mich 630. Rather, the *Milbourn* Court applied the "principle of proportionality" and rendered its decision. *Id.* at 650–54. This Court should likewise adopt and apply the principal of proportionality established in *Milbourn*, which affords the proper deference to trial courts and the proper authority of review to appellate courts, which the common three-fold standard of review encompasses, discussed *infra*, Section (I)(f).

The People find support for our position, that a heightened standard of review is erroneous, in the United States Supreme Court's opinion in *Gall v United States*, 552 US at 49, in which the Court *rejected* the application of a heightened standard of review, which amounted to *de novo* review, to sentences imposed outside of the federal sentencing guidelines. The *Gall* Court held that employing a heightened standard of review "is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of *all sentencing decisions*—whether inside or outside the Guidelines range." *Id.* (emphasis added). Likewise, *Milbourn* does not direct a court to employ a heightened standard of review. Rather, it encourages deference, but not unfettered deference. Here, the *Hyatt* majority added an erroneous layer to the standard of review because of an erroneous interpretation of *Miller* and *Montgomery* and, in doing so, misconstrued *Milbourn*.

ii. <u>The language constituting the heightened standard of review is patently contradictory, conflating multiple standards, ultimately resulting in an untenable disguised *de novo* standard of appellate review.</u>

The next compounding error in the *Hyatt* majority's creation of the heightened standard of review is the patently contradictory language within its opinion. After stating the common three-fold standard of review applies to review of JLWOP sentences, the majority asserted that a

"heightened degree of scrutiny" was necessary. *Hyatt*, ___ Mich App at ___; slip op at 25–26. Then, it classified this heightened degree of scrutiny as a "deferential standard." *Id.* at ___; slip op at 26. Then, it proclaimed that a LWOP sentence should be viewed as "inherently suspect" under "the abuse-of-discretion standard" and that courts should have an "understanding that more likely than not, the [LWOP] sentence imposed is disproportionate." *Id.* Yet, the majority then stated, "[W]e do not suggest a presumption against the constitutionality of such a sentence." *Id.*

First, the *Hyatt* majority erred in claiming that its heighted standard of review was deferential. *Black's Law Dictionary* (10th ed) defines "deferential review" as "[a]n appellate standard granting relief from a lower court's, esp[ecially] a trial court's, judgment only when [an] earlier proceeding entailed an unreasonable application of clearly established law or a clearly unreasonable determination of the facts." Nothing in the definition of "deferential review" suggest, implicates, or allows an appellate court to second-guess a trial court's decision on a matter just because the ultimate result is not "expected" or because the appellate court may "dislike" the ultimate decision. Thus, the *Hyatt* majority's heightened standard of review, which requires an appellate court to *pre-judge* a JLWOP sentence as "inherently suspect," does not equate with "deferential review."

Second, the *Hyatt* majority incorporated its "inherently suspect" standard into the abuse-of-discretion standard, which results in a paradoxical standard of review. "An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes." *People v Seewald*, 499 Mich 111, 116; 879 NW2d 237 (2016) (quotation marks and citation omitted). The principled outcomes in a JLWOP case are either a term-of-years sentence or a LWOP sentence. MCL 769.25. Yet, the *Hyatt* majority said that a LWOP sentence is "inherently suspect." ___

Mich App at ___; slip op at 26. The majority did not explain what "inherently suspect" means. *Id.* The majority only said, "[LWOP] sentences should require a searching inquiry into the record and the understanding that, more likely than not, the sentence imposed is disproportionate." *Id.* Thus, the majority requires trial and appellate courts to begin their analysis of a sentence under MCL 769.25 with the presumption that a LWOP sentence is already disproportionate, regardless of any facts. Yet, it also said that it "do[es] not suggest a presumption against the constitutionality of such a sentence." *Id.* This is illogical. The majority presumed LWOP sentences to be disproportionate, which necessarily means the sentence is unconstitutional, see generally *Milbourn*, 435 Mich 630 (a disproportionate sentence is unconstitutional), but the majority did not presume them to be unconstitutional. So, it appears that a LWOP sentence is unconstitutional because it is disproportionate (unless it is not, *post hoc*), but LWOP remains a "principled outcome" under the abuse-of-discretion standard of review. The People submit this heightened standard of review is patently contradictory, untenable, and paradoxical, requiring this Court to reverse the *Hyatt* majority. Nowhere in *Miller* or *Montgomery* did the Court declare JLWOP sentences disproportionate, absent the required individualized hearing. In fact, the *Miller* Court specifically declined such a categorical rule, stating, "Our decision does not categorically bar a penalty for a class of offenders or type of crime[.]" 567 US at ___; 132 S Ct at 2471.

Moreover, "[a] presumption is best described as a procedural device. The function of a rebuttable presumption is solely to place the burden of producing evidence on the party opposing the presumption." *Reed v Brenton*, 475 Mich 531, 549; 718 NW2d 770 (2006). To the People, the majority's presumption (at the trial and appellate levels), that LWOP is disproportionate, operates as full proof until successfully rebutted. Yet, this contradicts *Miller* and MCL 769.25. If LWOP for a juvenile murderer is presumed disproportionate, then he or she need do nothing at a

sentencing hearing. MCL 769.25(6), however, specifically requires consideration of numerous "*Miller* factors" of which only the defendant would likely have knowledge, i.e., family, home, and neighborhood environment, peer pressure, past exposure to violence, mental health issues, emotional issues, and much more. In addition, MCL 769.25(7) requires the trial court place its findings as to aggravating *and mitigating* circumstances on the record in support of its sentence. Certainly, the prosecution will not produce mitigating circumstances. Therefore, since the essential information to mitigate a LWOP sentence is in the hands only of the defendant, placing the sole burden on the prosecution would be an incentive for a defendant to withhold it and "hope" that the trial court believes the prosecution did not overcome the presumption. Cf. MCL 768.21a(3) (defendant bears the burden of proof to prove insanity as only he would have such information).

Contrary to the *Hyatt* majority, a JLWOP sentence is not to be viewed under a heightened standard of review as "inherently suspect." It is illogical to have an "inherently suspect" sentence, which is also presumptively disproportionate, as a potential sentence at all. The majority's reasoning and ruling amounts to what Chief Justice ROBERTS called, "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). Just as Chief Justice ROBERTS rebuked the majority in *Miller*, stating, "[i]f 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[,]" *id.*, the *Hyatt* majority will likewise have bootstrapped its way to declaring JLWOP sentences "uncommon" in Michigan because the appellate framework declares them unconstitutionally disproportionate without considering any

facts of the case.[8] Hence, trial courts may conceivably steer shy of imposing such sentences out of hesitation of being reversed even though a particular defendant may be deserving of LWOP.

Finally, in Michigan, our courts presume a statute enacted by our Legislature to be constitutional. *People v Harris*, 495 Mich 120, 133; 845 NW2d 4777 (2014). The *Hyatt* majority has ignored this presumption by declaring JLWOP sentences "inherently suspect" and "presumptively disproportionate"; in essence, *malum in se*. Accordingly, a heightened standard of review runs counter to the presumption that statutes are constitutional in Michigan. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Furman v Georgia*, 408 US 238, 383; 92 S Ct 2726; 33 L Ed 2d 346 (1972) (BURGER, C.J., dissenting).

The *Hyatt* majority's double speak, whether intentional or not, perhaps only advances the majority's disguised rule that a *de novo* standard of review is appropriate on appellate review in lieu of abuse of discretion. In essence, the *Hyatt* majority has not, as it claimed to do, "clarif[ied] what the abuse-of-discretion standard should look like in the context of life-without-parole sentences for juveniles." ___ Mich App at ___; slip op at 25–26. Instead, it has rewritten *Miller*, *Montgomery*, and MCL 769.25.

[8] The People would be remiss if we did not note that two judges of the *Hyatt* majority also issued a concurring opinion, which was irrelevant to the resolution of the conflict, urging this Court to declare JLWOP unconstitutional under Michigan's Constitution. *People v Hyatt*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 325741) (BECKERING, J., concurring, joined by SHAPIRO, PJ.) Such an issue was never raised by Defendant in the trial court or during his direct appeal from which the conflict was declared. It was only raised scantly in his brief for the conflict panel. *Id.* at __; slip op at 1. It appears that the concurrence when coupled with the heightened standard of review is an attempt by the Court of Appeals to bootstrap, as Chief Justice ROBERTS would say, its way to making JLWOP in Michigan "uncommon," and thus "cruel or unusual" in Michigan.

d. The majority also premised its heightened standard of review on its belief that trial courts and appellate courts would "rubber-stamp" juvenile life-without-parole sentences, but such an idea is unfounded and incredible, which further mandates reversal of the heightened standard of review.

Another fatal error with the *Hyatt* majority's reasoning for employing a heightened standard of review stems from its unfounded belief that trial courts and appellate courts will "rubber-stamp" LWOP sentences.[9] In its opinion, the majority asserted that a heightened standard of review is necessary because "review of a juvenile life-without-parole sentence cannot be a mere rubber-stamping of the penalty handed out by the sentencing court." *Hyatt* ___ Mich App at ___; slip op at 26. "An appellate court must give meaningful review to a juvenile life-without-parole sentence and cannot merely rubber-stamp the trial court's sentencing decision." *Id.* at ___; slip op at 27. The People are unaware of any authority or facts supporting the *Hyatt* majority's assumption that trial courts or appellate courts will "rubber-stamp" JLWOP sentences. The majority's reasoning and ruling is contrary to the historical jurisprudence of our judicial system.

Implicit within the *Hyatt* majority's reasoning is the assumption that an imposed JLWOP sentence is wrong. The *Hyatt* majority has said as much by stating that such sentences are "inherently suspect" and presumably "disproportionate." Adopting such beliefs, the majority is suggesting—without explicitly stating—that trial courts cannot be trusted to impose the correct, proportionate, and legally valid sentences in these situations, hence the need for a heightened standard of review. This reasoning is wrong. Our judicial system's history has long looked to the jury and the trial judge as the lawful hands that impose sentences; "[t]here was little or no

[9] In our initial Amended Application for Leave to Appeal, the People read the *Hyatt* majority's opinion as indicating a belief that only *trial courts* would "rubber-stamp" LWOP sentences. On further review, we realize the *Hyatt* majority also believes *appellate courts* will also "rubber-stamp" LWOP sentences.

appellate review of sentencing" until the 1980s. See Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 Journal of Criminal Law and Criminology 691, 691–97 (2010) (discussing the development of sentencing practices during pre-independence colonial times, post-independence, and in the modern era).

Of course, our criminal justice system has developed to incorporate appellate review of sentences to guard against excessive disparity. See *id.* at 698–706 (discussing the development of appellate review of sentences and the federal sentencing guidelines). Nevertheless, the appellate review process has always afforded proper deference to trial courts and juries who impose sentences. This central principle was reaffirmed in *Gall*, 552 US at 51–52, in which the United States Supreme Court observed,

> The sentencing judge is in a superior position to find facts and judge their import under [the federal sentencing guidelines] in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record. [ ] "The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court." *Rita* [*v United States*], 551 US 338, 357–58; 127 S Ct [2456; 168 L Ed 2d 203 (2007)]. Moreover, "[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." *Koon v United States*, 518 US 81, 98; 116 S Ct 2035; 135 L Ed 2d 392 (1996).[ ]
>
> "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Id.*, at 113.[8] The uniqueness of the individual case, however, does not change the deferential abuse-of-discretion standard of review that applies to all sentencing decisions.

[8] It is particularly revealing that when we adopted an abuse-of-discretion standard in *Koon*, we explicitly rejected the Government's argument that "de novo review of departure

> decisions is necessary to protect against unwarranted disparities arising from the differing sentencing approaches of individual district judges." 518 US at 97 [internal quotation marks and citation omitted]. Even then we were satisfied that a more deferential abuse-of-discretion standard could successfully balance the need to "reduce unjustified disparities" across the Nation and "consider every convicted person as an individual." 518 US at 113.
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> [Alterations to citations added; footnote seven omitted.]

Michigan's sentencing jurisprudence has largely mirrored the federal development, likewise applying the same rationale in the appellate review of sentences. See *Hardy*, 494 Mich 430; *Babcock*, 469 Mich 247; *Hegwood*, 465 Mich 432; *Milbourn*, 435 Mich 630. Nothing in *Miller* or *Montgomery* changed the balance of judicial power among trial and appellate courts. Rather, the cases only require an individualized sentencing for juveniles formerly subject to mandatory LWOP for committing first-degree murder in Michigan. Nothing about the decisions vested appellate courts with broadened authority over trial court sentencing decisions. Trial courts are still in the best position to impose the correct sentence, and whether LWOP is "rare" or "uncommon" is irrelevant as long as a LWOP sentence is validly imposed after considering whether the juvenile murderer's crime reflects irreparable corruption or transient immaturity in light of the totality of the factors considered. *Miller*, 567 US at ___; 132 S Ct at 2469.

To guard against LWOP sentences, the majority is apparently also distrustful of its colleagues because it states that the heightened standard of appellate review is necessary to prevent "rubber-stamping" of these sentences. *Hyatt*, ___ Mich App at ___; slip op at 26–27. The People find it difficult to conceive that appellate judges in Michigan would "rubber-stamp" anything. If a heightened standard of review is required because of this fear, why do appellate judges in Michigan not have a heightened standard of review for *all* criminal sentences? Do not all sentences have a maximum possible penalty, and would it not be true that the imposition of the maximum possible penalty for any crime should be "uncommon" or "rare" or inapplicable to

a "vast majority" of defendants? This Court has never imposed a heightened standard of appellate review, and it should not do so in this case, because such a standard is a disguised *de novo* standard of review, which does not afford proper deference to the trial court. Accordingly, reversal of the majority's heightened standard of review is necessary.

Trial courts and appellate courts are presumed capable and willing to follow the law. *Wagar v Peak*, 22 Mich 368, 370; 2 Mich NP Supp 80 (1871) ("we must presume that the rulings of the trial court were correct, in the absence of any thing showing them to be wrong"). Trial courts have sufficient direction from *Miller*, *Montgomery*, and MCL 769.25 to sift through disputed facts and credibility issues in order to decide whether a juvenile murderer is in the protected class of defendants immune to a LWOP sentence because his or her crime does not reflect irreparable corruption. Absent concrete problems that have yet to appear in actuality in any form, and likely never will, this Court should not override legislative policy determinations of our Legislature and enact a heightened standard of review to "guard against" JLWOP sentences.

e. The common three-fold standard of appellate review applies to the review of sentences under MCL 769.25 because it affords proper deference to trial courts and provides appellate courts with sufficient authority to correct errors of law and fact made by a lower court, and other jurisdictions have adopted similar deferential standards of appellate review of juvenile life-without-parole sentences.

This Court should hold that the common three-fold standard of review is the correct analysis to employ on appellate review because it provides the appropriate balance between the levels of the judicial system, giving deference to the trial court and permitting the appellate court to correct legal errors, rather than permitting the appellate court to substitutes its judgment for that of the trial court. The common three-fold standard of review accomplishes exactly what the

heightened standard of review claimed to do, but does not infringe on the balance of powers among the levels of court.

To begin, any questions of law, such as the interpretation of law or application of law are reviewed *de novo*. *People v Hall*, 499 Mich 446, 451–52; 884 NW2d 561 (2016). The imposition of a JLWOP sentence *is not* purely a question of law. The *Hyatt* majority comingled the factual nature of a JLWOP-sentence inquiry by describing it at a higher level of generality linked closely to questions of law. The *Hyatt* majority continuously reiterated that JLWOP sentences should be "uncommon" or reserved for the "truly rare juvenile," ___ Mich App at ___; slip op at 27–28, thus justifying the heightened standard of review, but does not explain how a trial court would necessarily determine such "rarity." If the Court of Appeals is permitted to have the sole power to determine who is "rare," this destroys the bounds separating a trial court's discretion from the appellate court's authority to review the sentence. The appellate court, in essence, acquires full authority over JLWOP sentences with no regard to the trial court's discretion. This is the wrong rule of law to adopt. Generally, a sentence is comprised of law, factual findings, and the ultimate decision. Hence, the appropriate standard of review is the common three-fold standard of review.

MCL 769.25(7) states that "the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." Thus, our Legislature envisioned that trial courts will make factual findings and place those findings on the record. As such, appellate courts have the authority and the duty to review those findings under the clear-error standard. In this regard, a trial court's factual findings cannot be disturbed unless the reviewing court is left with a definite and firm conviction that the trial court made a mistake, affording deference to the better-situated trial court judge. *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014). The *Hyatt* majority seeks to expand this

standard by "requir[ing] a searching inquiry into the record" to make its own determinations. *Hyatt*, ___ Mich App at ___; slip op 26–27. Such expansion of appellate power is unwarranted and untenable. If the appellate courts were intended to find the facts necessary to impose sentence, then the Legislature would have granted them such power, and it did not. Thus, the majority's heightened standard of review must be reversed because proper deference must be afforded to the trial courts' factual findings.

Finally, an imposed JLWOP sentence is reviewed for an abuse of discretion. "An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes." *Seewald*, 499 Mich at 116 (internal quotation marks and citation omitted). This Court has also held that a trial court necessarily abuses its discretion when it makes an error of law. *People v Feeley*, 499 Mich 429, 434; 885 NW2d 223 (2016) (citation omitted). In the context of criminal sentencing, the abuse-of-discretion standard is intended to chart a course between two extremes. See *Milbourn*, 435 Mich at 651–52. It is clear that appellate courts are to afford significant deference to a trial court's sentencing decision. Appellate courts may not reverse sentences just because they think a different sentence is appropriate. *People v Smith*, 482 Mich 292, 303; 754 NW2d 284 (2008); see also *Gall*, 552 US at 51–52. At the same time, appellate review is not foreclosed in the context of JLWOP sentences. A trial court is certainly exercising discretion when choosing between a term-of-years and a LWOP sentence, and appellate courts will review such decisions.

Adopting and applying the abuse-of-discretion standard of review, and rejecting heightened standards of review, has already been the chosen path of numerous sister jurisdictions with which Michigan should join. In our Amended Application for Leave to Appeal, pp 34–36, we listed and discussed those states of which we were aware that chose to apply an abuse-of-

discretion standard of review, those were: *People v Palafox*, 231 Cal App 4th 68; 179 Cal Rptr 3d 789 (2014)[10]; *State v Lovette*, 758 SE2d 399 (NC App 2014); and *Commonwealth v Batts*, 125 A3d 33; 2015 PA Super 187 (2015), lv granted in part 135 A3d 176 (Pa 2015). Each jurisdiction incorporates similar deference principles as Michigan's common three-fold standard of review.

In addition to the foregoing cases, the People have found more sister and federal jurisdictions that have declined a heightened standard of review in the context of JLWOP and have chosen to impose an abuse-of-discretion standard of review. In *Conley v State*, 972 NE2d 864, 873, 880 (Ind 2012), the Indiana Supreme Court affirmed the juvenile defendant-appellant's

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[10] As explained in the body of this Supplemental Brief, *supra*, Section (I)(b)(ii)(1), in *People v Palafox*, 231 Cal App 4th 68, 91–92; 179 Cal Rptr 3d 789 (2014), the California appellate court applied its standard abuse-of-discretion review, but said it also conducted its own "independent review." *Palafox*'s independent review appears inconsistent with the California Supreme Court's ruling in *People v Gutierrez*, 58 Cal 4th 1354, 1387; 171 Cal Rptr 3d 421; 324 P3d 245 (2014), which stated, "We hold that section 190.5(b) confers discretion *on the sentencing court* to impose either life without parole or a term of 25 years to life on a 16– or 17–year–old juvenile convicted of special circumstance murder, with no presumption in favor of life without parole." (Emphasis added). Nowhere did the California Supreme Court allow "independent reviews" of sentences. The People read *Palafox*'s "independent review" in light of later California cases, which have conducted "independent reviews" in the context of JLWOP to determine whether such sentences are "cruel or unusual punishment" under the California constitution, which was an issue in *Palafox*. See, e.g., *People v Garcia*, ___ Cal 2d ___, ___; ___ Cal Rptr 3d ___ (2016) (Docket No. E059452), p 5 (conducting an "independent review" of JLWOP sentence under the constitutional cruel or unusual punishment clause); *People v Moffett*, unpublished decision of the California District Court of Appeal, issued December 7, 2016 (Docket No. A143724), p 12, citing *Palafox*, 231 Cal App 4th at 82 ("Whether a punishment is cruel and/or unusual is a question of law subject to our independent review, but underlying disputed facts must be viewed in the light most favorable to the judgment."). *Palafox*'s "independent review" is not followed in all California JLWOP cases, lending support to the conclusion there is no independent review of a JLWOP sentence. See, e.g., *People v Lewis*, unpublished opinion of the California District Court of Appeal, issued November 10, 2016 (Docket No. D068311), p 6–8 ("[W]e evaluate an Eighth Amendment challenge to the trial court's decision to sentence a juvenile to life without parole for homicide under the abuse of discretion standard of review. This standard of review also follows from the inherently discretionary nature of the process of weighing and balancing the relevant factors.") To the extent *Palafox* is read to allow independent review of a sentencing decision, with no regard to the trial court, we believe such an interpretation is erroneous under California law. Nevertheless, a "heightened" standard of review was not applied to presume LWOP sentences "inherently suspect" or "disproportionate" in California.

LWOP sentence under the abuse-of-discretion standard of review and also applied the abuse-of-discretion standard to the trial court's determination of the proper weight to assign to aggravating and mitigating circumstances. In *United States v Guerrero*, 560 Fed Appx 110, 112 (CA 2, 2014), the defendant-appellant challenged his LWOP sentence, and the court "review[ed] [his] sentences under an abuse of discretion standard for procedural and substantive reasonableness." Other jurisdictions adopting the proper deferential abuse-of-discretion standard of review include: Louisiana, *State v Williams*, 178 So 3d 1069, 1074, 1074 n 6 (La App 2 Cir 2015); Mississippi, *Hudspeth v State*, 179 So 3d 1226, 1228 (Miss App 2015); Nebraska, *State v Cardeilhac*, 293 Neb 200, 214–15; 876 NW2d 876 (Neb 2016); and Illinois, *People v Stafford*, 2016 Il App 140309; 406 Ill Dec 790, 795, 800; 61 NE3d 1058 (Il App 2016).

As other jurisdictions have appropriately recognized, a sentence of LWOP for a juvenile murderer should be reviewed under the deferential abuse-of-discretion standard of review. In Michigan, this deference comes in the form of the common three-fold standard of review, which this Court should apply to review of all sentences under MCL 769.25.

f. The majority's reliance on and implementation of United States v Haack *is appropriate in the context of appellate review of sentences under MCL 769.25, but clarification is necessary to apply the standard of review correctly.*

The People recognize the difficulty in applying a "factor" analysis in the context of sentencing under MCL 769.25. Unlike MCL 769.25, Michigan's sentencing guidelines do not rely on enumerated factors in relation to a sentence. As far as the People are aware, MCL 769.25 sets forth the first time in Michigan's jurisprudence that courts are required to consider enumerated factors in order to determine an appropriate sentence. Compare MCL 777.1 *et seq.* (Michigan's sentencing guidelines do not employ a factor approach to sentencing), with 18 USC 3553(a) (federal sentencing guidelines employ a factor approach).

To aid an appellate court's review of the trial court's sentencing decision, the *Hyatt* majority adopted the standard in *United States v Haack*, 403 F3d 997, 1004 (CA 8, 2005). *Hyatt*, ___ Mich App at ___; slip op at 27.[11] In *Haack*, the court explained the circumstances in which a trial court could be found to have abused its discretion under a factor analysis in the context of federal sentencing guidelines:

> A discretionary sentencing ruling, similarly, may be unreasonable if [(1)] a sentencing court fails to consider a relevant factor that should have received significant weight, [(2)] gives significant weight to an improper or irrelevant factor, or [(3)] considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case. [403 F3d at 1004 (alterations added).]

The *Hyatt* majority went no further than this citation of *Haack* during its analysis of why *Haack* should apply. *Hyatt*, ___ Mich App at ___; slip op at 27. The People believe that the application of *Haack* in the context of JLWOP sentences is helpful and appropriate because MCL 769.25 requires Michigan courts to analyze factors similar to the procedure of the federal sentencing guidelines. Nevertheless, the *Hyatt* majority's application of *Haack* needs further clarification to strike the right balance of power between the appellate courts and the trial courts. To aid in the clarification of the application and meaning of *Haack* in the JLWOP context, reliance on federal precedent is beneficial.

[11] As noted by the *Hyatt* majority, the Court of Appeals, in *People v Steanhouse*, 313 Mich App 1, 22; 880 NW2d 297 (2015), lv granted 499 Mich 934; 879 NW2d 252 (2016), rejected the application of *United States v Haack*, 403 F3d 997, 1004 (CA 8, 2005) in the context of our state's sentencing guidelines after the issuance of *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). *Hyatt*, ___ Mich App at ___; slip op at 27 n 17 (opinion of the Court). The Court of Appeals was correct in *Steanhouse* because Michigan's sentencing guidelines regime does not employ "factors" like the federal regime. In this case, however, MCL 769.25 and *Miller* require the application of factors, which is why the People view *Haack* as helpful.

In the context of MCL 769.25, there are necessarily two components to determine whether to impose a term-of-years or a LWOP sentence: a procedural component and a substantive component. First, as to the procedural component, in the context of the federal sentencing guidelines, the United States Supreme Court has explained that procedural error occurs when a trial court "fail[s] to consider the [18 USC] 3553(a) factors, select[s] a sentence based on clearly erroneous facts, or fail[s] to adequately explain the chosen sentence[.]" *Gall*, 552 US at 51. Comparatively, under MCL 769.25, a trial court is procedurally required to conduct a hearing on the motion for LWOP where "the trial court shall consider the factors listed in *Miller v Alabama*, 5[67] US_____; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated[,]" MCL 769.25(6), and "[a]t the hearing the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed[,]" MCL 769.25(7). Accordingly, if a trial court in Michigan fails to consider the "*Miller* factors" as directed by MCL 769.25(6), or selects a sentence based on clearly erroneous findings of fact, or fails to adequately explain its imposed sentence in accordance with MCL 769.25(7), then the trial court has committed a procedural error *potentially* resulting in an abuse of discretion.

Second, as to the substantive component of JLWOP sentences, the United States Supreme Court has explained in the context of the federal sentencing guidelines, "Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances . . . ." *Gall*, 552 US at 51. The Court also recognized, "The fact that the

appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Id.*; see also *United States v Irey*, 612 F3d 1160, 1189 (CA 11, 2010) ("[U]nder the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how an abuse of discretion standard differs from a *de novo* standard of review.").

The three-factor analysis of *Haack* constitutes part of the substantive component of the abuse-of-discretion standard of review. Yet, as stated, clarification is necessary by this Court. First, this Court should hold that the application of *Haack* in the context of JLWOP sentences requires an analysis under "the totality of the circumstances" and not a "balancing test." A totality-of-the-circumstances analysis requires a consideration of all relevant factors when determining the appropriate result and no single factor is dispositive. See *Scheckloth v Bustamonte*, 412 US 218, 226; 93 S Ct 2041; 36 L Ed 2d 854 (1973) (explaining that a totality-of-the-circumstances analysis is appropriate to determine whether a statement is "voluntary" under the Fifth Amendment because no single factor is controlling, rather "careful scrutiny" of all of the surrounding circumstances is necessary). On the other hand, a balancing test requires a balance of two potential interests in light of various factors to reach the ultimate result. See *Graham v Connor*, 490 US 386, 396; 109 S Ct 1865; 104 L Ed 2d 443 (1989) (explaining that a balancing test is required to determine if force used to affect a particular seizure is "reasonable" under the Fourth Amendment, where courts balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." (Internal quotation marks and citation omitted)). Under MCL 769.25 and *Miller*, there is no requirement, or suggestion, that the "*Miller* factors" must be balanced in light of two

potential interests, or that one factor balances more heavily than others. Instead, *Miller* is quite clear, the Court "require[s] [sentencers] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 US at ___; 132 S Ct at 2469. *Miller*'s holding requires sentencers (trial courts in Michigan) to analyze the *totality of the circumstances* guided by the "*Miller* factors" as codified in MCL 769.25. MCL 769.25 did not alter *Miller*'s totality-of-the-circumstances approach.

With the understanding that JLWOP sentences are to be determined and reviewed under a totality-of-the-circumstances approach, this Court should next clarify how the abuse-of-discretion standard operates with the addition of *Haack*. *Haack* provides three potential ways a trial court may abuse its discretion when sentencing a juvenile murderer to LWOP: (1) failure to consider a relevant factor that should have received significant weight, (2) giving significant weight to an improper or irrelevant factor, or (3) committing clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case. 403 F3d at 1004.

With respect to the first two prongs of *Haack*'s analysis, there are two components to these prongs that need clarification: (1) how to determine a "relevant factor" or "irrelevant factor"; and (2) what does "significant weight" mean? First, this Court should clarify and hold that it is *not* incumbent on the sentencing judge to raise every conceivably relevant factor or issue on his or her own initiative when passing sentence in the context of JLWOP. See *Gall*, 552 US at 54. To hold otherwise would be to encourage reversal on appellate review for potentially irrelevant factors that were simply not mentioned or considered because they bore no relevance or weight in the trial court's analysis, thereby affording little to no deference to the trial court.

Second, this is the place that the People believe the capital sentencing regime may be helpful. In the context of capital sentencing, courts define a "relevant factor," in the context of "aggravating factors" for the death penalty, as "one that assists the sentencer in distinguishing those who deserve capital punishment from those who do not." *United States v Solomon*, 513 F Supp 2d 520, 526 (WD Pa, 2007) (citation omitted), quoting *Arave v Creech*, 507 US 463, 474; 507 S Ct 1534; 123 L Ed 2d 188 (1993). Likewise, the People submit that this Court should hold that "a factor is relevant only if it assists the court in distinguishing whether the juvenile murderer deserves LWOP or not."[12] Consequently, a factor is "irrelevant" if it "does not assist the court in distinguishing whether the juvenile murderer deserves LWOP or not."

Third, this Court should clarify and hold that "significant weight" means more than a "close call" about the weight of a factor. Rather, an appellate court may properly determine an unconsidered relevant factor should have received "significant weight" only when that weight would "more probably than not affect the outcome of the sentence" and the burden should be on the proponent of the challenge to prove the position. See *People v Lukity*, 460 Mich 484, 495–96; 596 NW2d 607 (1999). Similarly, an irrelevant or improper factor received "significant weight" when it "more probably than not affected the outcome of the sentence." See *id.* Without such definitions for guidance, an appellate court is free to conduct an unguided *de novo* review of a JLWOP sentence and is free to determine on its own basis what factor is "relevant" or

[12] We also assert that the definition should not be couched in terms of a "relationship" like the death penalty definition because an individualized sentence should not be dependent on other JLWOP sentences. The question for a trial court is not, "Whether this juvenile murderer deserves LWOP in light of another juvenile murderer's sentence?"; rather, the question is, "Does this juvenile murderer's crime reflect irreparable corruption or transient immaturity based on the relevant factors?" Defining "relevant factor" exactly like the death penalty context refocuses the "individualized sentencing" context and puts it into a "global sentencing" context based on all other juvenile murderers, which is inconsistent with the holding of *Miller*, 567 US at ___; 132 S Ct at 2469.

"irrelevant," and how to define "significant weight." Adopting these definitions provides the needed clarity and proper deference to the trial court and still allows proper appellate review.

The final way a trial court may abuse its discretion under *Haack* is when it "considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case." 403 F3d at 1004. The *Hyatt* majority did not define when a "clear error of judgment" occurs. Turning to federal cases, "a clear error of judgment" occurs "when [the trial court] considers the proper factors but balances them unreasonably." *United States v Irey*, 612 F3d 1160, 1189 (CA 11, 2010) (citation omitted). "Reasonableness" should be determined in light of Michigan's own jurisprudence, *People v Milbourn*, 435 Mich 630, to determine if the ultimate sentenced imposed violates the principle of proportionality. In making this determination, the appellate court should examine the record as a whole to gauge the sentencing judge's thought process to determine if the factors were balanced unreasonably. This Court should adopt this definition for clarity and elucidate that this analysis is conducted through the prism of abuse of discretion, giving trial courts deference in their decision-making abilities.

In sum, *Haack* provides the appropriate guidance for trial courts and appellate courts when imposing and reviewing JLWOP sentences, respectively. This Court, however, should clarify the standard as discussed *supra* and particularly reinforce the legal principle that the *Haack* analysis is incorporated within the abuse-of-discretion standard of review. The analysis does not permit appellate courts to conduct a *de novo* review of what factors the court found or did not find relevant, how much weight should have been afforded to the factors, nor does the analysis allow an appellate court to substitute its judgment for that of the trial court based on the decision that it would have imposed a different sentence. In addition, the People believe the

analysis provides the proper scrutiny of JLWOP sentences, for which all of the *Hyatt* judges strived, but does so without the conflated and invalid "heightened standard of review" imposed by the *Hyatt* majority.

g. Application of the appropriate three-fold standard of review to this case mandates reversal of the appellate court and reinstatement of the trial court's sentence of life without parole for Defendant.

Having established that the *Hyatt* majority's heightened standard of review is premised on an incorrect interpretation of *Miller*'s holding, and thus inappropriate, and having established the common three-fold standard of review is appropriate and applicable, this Court should reverse the *Hyatt* majority's decision to vacate Defendant's LWOP sentence. This Court should hold that the trial court complied with all of the legal principles, made accurate findings of fact, and did not abuse its discretion when imposing a LWOP sentence on Defendant.

First, there was no procedural error in this case as the trial court complied with MCL 769.25 and *Miller*. Next, the trial court substantively complied with MCL 769.25 and *Miller*. Before imposing a JLWOP sentence, *Miller* and MCL 769.25 require a trial court consider: (a) the chronological age of Defendant and the hallmark features of youth—among them, immaturity, impetuosity, and failure to appreciate risks and consequences; (b) the family and home environment that surrounds the defendant; (c) the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him; (d) incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys; (e) the possibility for rehabilitation. *People v Carp*, 496 Mich 440, 466; 852 NW2d 801 (2014), judgment vacated sub nom *Davis v Michigan*, ___ US ___; 136 S Ct 1356; 194 L Ed 2d 339 (2016), citing *Miller*, 567 US at ___; 132 S Ct at 2468. MCL 769.25(6) also

permits a trial court to consider any other relevant information. Not every factor will necessarily be relevant in every case, such as where there is no indication of a troubled childhood or intellectual disability, etc. *Gutierrez*, 58 Cal 4th at 1390.

Before imposing sentence in this case, the trial court made valid, record-supported findings of fact based on the testimony from the *Miller* hearing, (see generally, MH), which were: (a) Defendant was seventeen years, two-and-a-half months old at the time he committed murder (S, 5–6, 7); (b) Defendant had an unstable family background, his mother was "in and out of the picture and certainly the father was the primary person that is the stable or ongoing person in his life" (S, 7–8); (c) Defendant's high school records show "a pattern of disrespectful and disorderly behavior that led to numerous suspensions and even threats to teachers" (S, 8); (d) Defendant's mother took him to a counselor because of his "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" (S, 8); (e) Defendant was connected to a gun problem two years before this homicide (S, 8); (f) Defendant's participation in this homicide was a "very well planned out incident" and was not "a spur of the moment" occurrence (S, 8); (g) Defendant and his co-defendants "planned this out"; they wanted to steal the gun of the victim, a security guard, and they had to have another gun to accomplish their goal (S, 8); (g) they concocted a rouse to isolate the victim, making it easier to steal his gun (S, 8–9); (h) Defendant shot the victim "not once, but four times," which the trial court found most disturbing (S, 9); (h) the murder was not an accident (S, 9); (i) the trial court had no information that had Defendant been eighteen years old that his decision or actions would have been any different (S, 9); (j) thus, his age was not a mitigating factor (S, 9); (k) the murder was not an act of impetuosity or recklessness (S, 9); (k) Defendant's claim that he was high on drugs at the time was not demonstrated by the record (S,

9–10); (l) Defendant was not illiterate (S, 10); (m) Defendant did not have his G.E.D. before the crime and he was deemed to have a below average IQ (S, 10); (n) Defendant did obtain his G.E.D. while incarcerated pending trial, which demonstrated his ability to learn; (o) Dr. Clark interviewed Defendant and found him to be "a polite, cooperative, responsive young man although very immature" (S, 10); (p) Defendant did not have a thought disorder (S, 10); (q) Defendant's thinking was logical and rational, but he was perceived to be "a seriously disturbed young man" (S, 10); (r) Defendant keeps his problems inside and does not express or deal with them effectively (S, 10); (s) Defendant "may experience periods of marked emotional cognitive or behavioral dysfunction" (S, 10); (t) Defendant was not seen as a leader (S, 10); (u) his adolescence was one of extreme turmoil (S, 10–11); (v) Defendant was very defiant and easily led (S, 11); (w) Defendant "was incapable of resisting negative influences" (S, 11); (x) "Doctor Clark thought within five years he would not be able to be reformed" (S, 11); (y) "[Dr. Clark] 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" (S, 11); (z) Defendant "is not a sensitive compassionate young man" (S, 11); (aa) while there was no way of predicting whether Defendant would be able to change his course, it would require "extreme effort and dedication on his part"; (S, 11); and (bb) much of Defendant's behavior was driven by drugs (S, 11).

Under the *Haack* analysis, the Court did not fail to consider a relevant factor that should have received significant weight, did not give significant weight to an improper or irrelevant factor, or commit a clear error of judgment by arriving at a sentence that lies outside the limited range of choices dictated by the facts of the case. That the trial court did not explicitly state on the record that it believed Defendant's "crime reflected irreparable corruption," such "magic words" are unnecessary where the trial court faithfully complies, procedurally and substantively,

with the mandates of *Miller*'s individualized sentencing requirement, and the sentence itself encompasses the conclusion. Cf. *Babcock*, 469 Mich at 259 n 13 (trial court not required to use "magic words" in the sentencing guidelines context). Accordingly, when imposing a sentence of life without parole on Defendant, the trial court did not abuse its discretion.

The *Hyatt* majority's conclusion that the trial court placed too much emphasis on Dr. Clark's opinion that Defendant would not be able to reform himself in five years is not supported by the record, and thus the *Hyatt* majority clearly erred in its analysis. *Hyatt*, ___ Mich App at ___; slip op at 28. Relying on our explanation and analysis of *Haack* with in this Brief, the possibility of early rehabilitation, i.e., within in five years, is certainly a relevant factor because if Defendant can be shown to reform himself within that period, then a term-of-years sentence is likely considered more appropriate. Thus, this consideration by the trial court was influential to its decision as it does assist the trial court in determining if the defendant is deserving or undeserving of LWOP. Moreover, the trial court, contrary to the majority's finding, did not place "too much emphasis" on this factor. The trial court stated, "A very important concern under *Miller*[,] as I've said the potential for rehabilitation and reformation of the offender, 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." (S, 11) (emphasis added). The majority, under its erroneous heightened standard of review, seized the opportunity to vacate a sentence with which it did not agree, thus substituting its judgment for that of the trial court. There is nothing in the record that shows the trial court placed too much emphasis on this sole factor; hence, the appellate court's failure to discuss this factor in light of the other dozens of factors the trial court considered. (See generally, S.)

In sum, the trial court made valid findings of fact, properly applied the law to the facts, and did not abuse its discretion when imposing a proportional sentence after a thorough consideration of the *Miller* factors under MCL 769.25. The *Hyatt* majority's substitution of judgment, as exemplified by its lack of analysis of all of the factors considered by the trial court, must be reversed, and the trial court's sentence of LWOP must be reinstated.

h. If this Court holds that Miller*'s "gratuitous prediction," that life-without-parole sentences should be "uncommon," is a rule of law, rather than obiter dictum, a heightened standard of review is still unnecessary because* Miller *implicitly makes a life-without-parole sentence "uncommon."*

If this Court decides that the respective beliefs about the "uncommon" or "rare" nature of a LWOP for a juvenile murderer stated in *Miller* and *Montgomery* amount to rules of law or binding judicial dicta, the People assert that a heightened standard of review is still not necessary or founded on legal principles. The concept of "rarity" is already incorporated within *Miller* and *Montgomery*'s substantive rulings, thereby negating the need for a duplicitous layer of scrutiny as to whether the juvenile murderer who received a LWOP sentence is, as the *Hyatt* majority declares, the "truly rare juvenile." *Hyatt*, ___ Mich App at ___; slip op at 1, 22, 24, 25, 27, 28. Furthermore, the standard of review proposed by the People provides proper deference to the trial courts and proper review authority to appellate courts to ensure the legally valid and correct sentence is imposed.

Under *Miller* and *Montgomery*, a juvenile murderer whose crime reflects "transient immaturity" is in a protected class, immune to a LWOP sentence. LWOP is allowed only for the "rare" juvenile murderer "whose crime reflects permanent incorrigibility." *Miller*, 567 US at ___; 132 S Ct at 2469, quoting *Roper v Simmons*, 543 US 551, 573; 125 S Ct 1183; 161 L Ed 2d 1 (2005). A juvenile murderer must be afforded an individualized sentencing hearing to show that he or she belongs to the protected class, and that the crime did not reflect irreparable

corruption. *Miller*, 567 US at ___; 132 S Ct at 2469. The People assert the concept of "rarity" is already true by definition—the determination of whether the juvenile murderer's crime "reflects irreparable corruption" or "transient maturity" necessarily incorporates the concept of "rarity." If a trial court finds that LWOP is the appropriate sentence, then the juvenile murderer is necessarily the "rare" juvenile who deserves the sentence. As Justice O'CONNOR observed in her dissent in *Roper*, 543 US at 603,—which appears to have been implemented by the majority in *Miller*—"[T]hrough individualized sentencing . . . the constitutional response can be tailored to the specific problem it is meant to remedy." (O'CONNOR, J., dissenting). Here, the *Miller* Court's *belief* that a LWOP sentence for a juvenile murderer ought to be "rare" is assimilated in the procedural mechanics of the individualized sentencing hearing.

Because deciding whether a juvenile murderer is in the protected class is a matter for "discretion at post-trial sentencing," *Miller*, 567 US at ___; 132 S Ct at 2475, our Legislature enacted MCL 769.25 to guide trial courts in the exercise of *their* discretion. The Legislature did not mandate that trial courts "make sure" that the imposition of LWOP on a juvenile murderer be "rare" or "uncommon." We assert our Legislature omitted such a mandate because the individualized hearing required by *Miller* encompasses this recognition. The whole point of the individualized hearing is to determine whether a juvenile murderer deserves a sentence of LWOP or a term-of-years. The sentencing determinations of our trial courts is entitled to deference, regardless of *Miller* and *Montgomery*'s prognostic beliefs.

Since the concept of "rarity" is already inherent in the imposition of a LWOP sentence, an appellate court need only apply the common three-fold standard of review, which we also assert should incorporate the *Haack* analysis. Imposing a heightened standard of review would be a vote of no-confidence not only on a trial court and an appellate court, but on the Legislature

for authorizing such sentences. This Court should not preempt our Legislature for the sake of unfounded assumption that trial courts and appellate courts in Michigan cannot understand and apply *Miller* and *Montgomery* faithfully. Courts are presumably already doing so, and to find otherwise seriously undermines the confidence in our judiciary. The unstated assumption advanced by the *Hyatt* majority and, presumably, Defendant underlying their policy arguments in support of the heightened standard of review is that this Court should go far beyond what *Miller* requires. That assumption is wrong. Given *Miller*'s own key rationale, that killers under the age of eighteen years old are prone to "impetuous and recklessness," *Miller*, 567 US at ___; 132 S Ct at 2467 (citation omitted), retaining availability of the harshest punishment is warranted to deter such conduct, and the sentence is applicable to those whose crime reflects irreparable corruption. The fact that juveniles are generally *less* culpable for their misconduct than adults does not necessarily mean that a 17-year-old murderer cannot be *sufficiently* culpable to merit a sentence of LWOP. See *Roper*, 543 US at 599 (O'CONNOR, J., dissenting).

i. Conclusion: The four-judge majority of the conflict-resolution panel of the Court of Appeals reversibly erred when it created and applied a heightened standard of review for sentences imposed under MCL 769.25 and when it vacated Defendant's life-without-parole sentence.

The majority's heightened standard of review suffers from four fatal flaws. First, it is premised on unfounded beliefs that *Miller* and *Montgomery*'s repeated mentions of how LWOP sentences should be "uncommon," "rare," or inapplicable to a "vast majority" of juvenile murderers amount to precedential rules of law, rather than obiter dicta. Second, from these beliefs, the *Hyatt* majority created its erroneous heightened standard of review, which it attempted to support with this Court's holding and analysis from *Milbourn*. The majority, however, overlooked the fact that *Milbourn* never suggested or implemented a heightened standard of review; in fact, the United States Supreme Court has explicitly rejected such a review

in *Gall* for "all sentencing decisions" in the federal guidelines sentencing context, and the underlying rationale for that decision should also apply here. Third, the patently contradictory language comprising the heightened standard of review is untenable as a rule of law. Fourth, the *Hyatt* majority erred when it assumed, without any rational basis, that trial courts and appellate courts in Michigan would "rubber-stamp" LWOP sentences, and then used its unfounded assumption to justify the increase in appellate-review power. Consequently, the heightened standard of review must be reversed.

Accordingly, when the *Hyatt* majority applied its erroneous heightened standard of review to the present case, it reversibly erred in vacating Defendant's life-without-parole sentence. This Court must reverse the appellate court and reinstate Defendant's properly imposed sentence of life without parole under the common three-fold standard of appellate review because the trial court applied the law correctly, made valid factual findings, and did not abuse its discretion when imposing the sentence.

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, Plaintiff-Appellant's, Amended Application for Leave to Appeal, or take peremptory action, MCR 7.305(H)(1), and reverse the Michigan Court of Appeals' majority opinion with respect to the creation and implementation of a heightened standard of review, Part IV; adopt the common three-fold standard of review for sentences imposed under MCL 769.25, incorporating the People's proposed analysis of *United States v Haack*; and consequently, analyze Defendant-Appellee's LWOP sentence under the common three-fold standard of review proposed by the People, and, accordingly, reverse the Court of Appeals' decision to vacate Defendant-Appellee's LWOP sentence, and reinstate and affirm the LWOP sentence legally imposed by the trial court.

Respectfully Submitted,

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